FINANCIAL INSTITUTIONS COMMITTEE
Business Law Section, State Bar of California

Minutes of the Meeting of August 14, 2007

Committee Members Present:
Rosie Oda, Chair
Meg Troughton, Vice Chair
Bruce Belton, Secretary
Michael Abraham
Sally Brown
Richard de la Pena
Laura Dorman
Andrew Druch
Linda Ianone
Todd Okun
Bob Stumpf
Will Stern
Shirley Thompson

Advisory Members and Others Present:
John Hancock
Ted Kitada
Robert Mulford
Joseph Sanchez
Kenneth Sayre-Peterson
Gerry Tsai
Steve Takizawa
Charles Washburn
Maureen Young
Mike Zandpour
Jan Amiel
Amy Pierce
David Skidmore

Call to Order: Rosie Oda called the meeting to order at 9:30 a.m.

1. Roll Call, Introductions and Administrative Matters: Rosie welcomed the Committee Members, Advisory Members and Guests.

2. Approval of the Minutes for May and July. The minutes for the meetings of May 8, 2007 and July 10, 2007 were approved by the Committee, as presented. There were no minutes for our meeting of June (which was a special presentation by Sara Kelsey, General Counsel of the FDIC).

3. FDIC Member Advertising. Shirley Thompson of Wells Fargo Bank provided a hand-out (attached), on the Revised FDIC regulations regarding advertisement of membership. The

effective date is November 13, 2007. The rule was published last year and institutions have been given one year to be in compliance. The major changes are the new signage requirements. The new rule eliminates separate signage for savings associations. The new signs need to be in place by November 13 and include the new FDIC internet website address and omit the FDIC seal. There is new language on top of the sign that states each depositor insured to "at least" $100,000. Previous language stated that depositors were insured only "to" $100,000. This is change permits the signs to remain accurate if there are future increases in coverage. The official sign has to be displayed at all teller stations, places where deposits are taken and *may* also be displayed at other locations in the institution or at "remote services facilities" (defined to include any ATM, cash machine, POS terminal or other remote electronic facility where deposits are received). Ted asked if remote deposit capture equipment would need to display the advertising. Shirley replied that this would constitute a remote services facility to which the advertising rule is optional.

The rule also extends the advertising requirements to Savings Associations. It is now required that all Savings Associations include the official "Member FDIC" statement in all advertising. Previously there was no equivalent requirement for insured savings associations. The rule also consolidates the exceptions to the advertising statement requirement. Previously there were 20 exceptions now shortened to 10. The FDIC did not intend to change the applicability of the rule but rather, preserve existing law (including existing exceptions to the old rule). Some of the exceptions were no longer needed because they have now defined "advertisement" to mean a commercial message in any medium that is designed to attract public attention or patronage to a product or business. Applicability of the requirement is also clarified and limited to advertising that specifically promotes deposit products or generally promotes banking services offered by the institution. "Full range of banking services" would be sufficient to trigger the advertising statement. Web pages are also considered advertising for purposes of the rule if they are promoting bank or deposit products (a separate advisory letter is published regarding internet advertising).

The new rule also has restrictions on use of the official advertising statement for non-deposit products. The non-deposit products definition now includes insurance products along with mutual funds and securities. Credit products are excluded from the definition of non-deposit products, apparently because of the minimal likelihood of confusion. There is also a new definition of "hybrid" products; those that include both deposit product features and non-deposit product features, and example would be a sweep product to a non-insured investment account. For advertising of only non-deposit products, the official advertising statement is not to be included. Non-deposit product advertising must be clearly segregated from deposit product advertising to avoid confusion about FDIC insurance coverage. The new definition of non-deposit investment products now includes insurance.

4. Merchant Fees Litigation. Jan Amiel of Bank of America reported on the merchant interchange fee litigation, as follows. The case is known as the "In re Payment Card Interchange Fee and Merchant Discount" litigation. This litigation is an effort on the part of several plaintiff class action firms and several large merchants to recast the payment card industry, including credit cards, debit cards, and the relationship that has previously been contractually arranged between the banks and their associations, and the acquirers and their merchants. This litigation could have far reaching implications. The case, commonly called the "Interchange" case, began in mid 2005 and is now a combination of a series of class and individual actions filed by merchants against Visa and MasterCard and several of their member banks. There are now several dozen of these actions that have been consolidated in a single multi-district proceeding in federal court in New York.

The plaintiffs have alleged that the Association and its member banks (totaling approximately 20,000) have conspired to fix interchange rates in the market for credit, charge, and offline debit cards. It is also alleged there was a conspiracy to adopt and enforce certain rules of the Association including so-called “anti-steering restraints” and surcharge rules, which are alleged to prevent consumers from using less expensive payment forms (i.e., cash). The Association is also accused of bundling and tying network processing and payment guarantee services to payment card systems service providers. Plaintiffs have asked for a jury trial and have not specified damages but suggest billions of dollars are at stake. The suit also seeks an injunction to reduce interchange fees. Plaintiffs’ counsel suggest there should be no interchange fees at all.

Anti trust liability is joint and several giving plaintiffs a huge hook into any party as the entire damages would be due from any party found liable. Thus, even a small bank with limited card transaction volume could be potentially responsible for a significant judgment and the entire industry damage. No trial date has been scheduled. Whatever damages are determined could be trebled plus plaintiffs’ fees. In the Wal-Mart case, a finding was made that interchange rates were 32% too high.

An additional suit was filed in March 2007 challenging the MasterCard IPO as an anti-trust violation by itself, including claims of fraudulent conveyance under New York state law. There are motions to dismiss that have been pending for nearly a year. One of those motions contends that the plaintiffs pre 2004 damages are barred by the Wal-Mart settlement. There are also individual merchant suits against names such as Walgreens, Ralphs, Safeway, Albertson’s etc.

Interchange is a short-hand term for payment made by a merchant acquirer to a card issuer for a given payment card transaction. The rates are not typically negotiated, although the parties are free to do so. Instead, the Associations each establish a range of default interchange rates which the merchant acquirers generally follow. Typical transaction involves payment to merchant and the entities including the card issuer and processor each of whom participate in the transaction. Merchant’s reimbursement for the sale is something less than the sale price of the goods or services. Processors and acquirers retain the difference. Acquirers submit data to the Visa system who also gets a small fee for transmission to the card issuer. The Issuer verifies the submission, authorizes the transaction and retains an interchange fee (e.g., 1.6%). It has been argued in the press that interchange is the “glue” that keeps the system together.

There is an also ATM interchange world which is the subject of interchange litigation but is not the topic for this discussion.

There is no single interchange rate. It varies by association and network, type of card, by the functionality attached to those cards. The nature of the transaction or terminal type vary by merchant. Visa has more than 70 interchange rates. Notwithstanding all the variability, plaintiffs nevertheless suggest this system is a lock-step conspiracy whose anti-competitive effects outweigh any pro-competitive effect. Plaintiffs also suggest that because of the membership structure of the Associations, everything those Associations did constituted a conspiracy.

Who would be responsible for the alleged damages, e.g., shareholders after the associations have gone public and how will it be determined who is liable? It is unusual to have a case of this magnitude, so many parties involved, have the association structure challenged and simultaneously attempt an international IPO, twice. Analysis is underway on the effect of the

IPO on the conspiracy theories, and whether the IPO could cut off any further exposure beyond the date of the offering. MasterCard has created a fund to handle the litigation liability, but they are gambling that there will not be an impact post IPO. The question of who will be responsible for interchange reduction is interesting because there have been a number of interchange incubators where central banks have entered into negotiations and have actually set interchange rates. Drops in interchange rates did not reduce costs to the consumer. Lost interchange typically results in increased annual fees to consumers and reduced reward programs. The outcome of these cases could result in multiple years of interchange fee reductions. It is unclear whether there will be any insurance coverage (some speculate that advertising injury might provide coverage). The carriers might also argue that intentional conduct and criminal conduct exclusions would be relied upon to deny coverage given the allegations of conspiracy.

Merchants are lobbying in all political forums for legislation to resolve the issues. The National Conference of State Legislatures has several resolutions pending on interchange fees. The role of the SEC is also being debated. Public policy personnel should be engaged in watching these activities and lending support where possible. Clients should also review and update anti-trust guidelines, both for pricing and purchasing teams and others likely to participate on a board or participate in industry committees where pricing or purchasing may be an issue. Boards and committees addressing these issues must be adequately advised and monitored by counsel for anti-trust issues.

There is no significant consumer litigation yet on interchange fees, but that is likely given past history of consumer litigation on all other pricing issues affecting consumer credit products.

5. Report on *Juarez v. Arcadia Financial*. Amy Pierce from Pillsbury Winthrop Shaw Pittman reported on the recent Fourth District decision in *Juarez v. Arcadia Financial Ltd.* (2007) 152 Cal. App. 4th 889 (copy attached, together with a summary of the case), as follows: The court interpreted the Reese Levering Vehicle Sales and Finance Act to require lenders to inform consumers whose cars are repossessed of the specific steps they must take including how much they have to pay to reinstate their conditional motor vehicle sales contracts. The Act requires lenders to provide a defaulting buyer of a notice of intent (NOI) to dispose of the vehicle before it is sold, thereby giving the borrower an opportunity to either redeem the vehicle or reinstate the contract. The Juarez decision interpreted one of the subsections of the Act, in particular the phrase “all conditions precedent” in the reinstatement clause. This significantly changed the interpretation being used in the industry. The case turned on whether this clause requires that the NOI specifically identify the dollar amount due for a borrower to reinstate. The Court focused on the reinstatement provision, which simply required that “all past due payments” must be paid together with repossession costs. The redemption amount was stated in the notice. The Court held that the notice was insufficient because the general recitation was not adequate to apprise the consumer of all conditions precedent. The Court further required not only the amounts, but their due dates, address and contact information, if, when, and how much the amounts will change over time, and any other specific actions the borrower must take. The lender must also go out and seek additional information it is able to discern from various sources, e.g., towing fee, sheriff’s fee etc. The Court determined that the lender may not place the burden on the consumer to find such information.

The Court rejected the arguments of Arcadia that not all information is known at the time the NOI is mailed. The challenge with the decision is that liability is likely to be prospective as well as retrospective because the Court did not establish a new rule but instead interpreted existing law.

As for lenders that have already obtained a deficiency judgment, defaulting borrowers may file motions to set aside the judgments against them. It is not clear whether the provisions of CCP section 473, after the requisite passage of time, would prohibit borrowers from revisiting deficiency judgments against them. As for pre-deficiency notices that did not comply with Juarez, there should be no attempts at collection, and perhaps these could be the basis for a 17200 action and a claim for conversion. Failure to give a notice (or proper notice) could result in a conversion claim. It is unknown whether or not there will be a further appeal.

6. Update on State Bar Annual Meeting Presentation. Meg Troughton reported that the program is ready for the State Bar meeting, and will be presented on Friday September 28 at 9:30 am. The presentation will be on data compromise and include a hypothetical. Meg suggested that the presentation might be repeated for the Committee and she will provide copies of the handout materials.

7. Report Legislative Subcommittee. Bob Mulford reported that the Legislature on vacation until August 20 and there still is no budget so nothing to report. His written report on pending legislation is attached.

8. Open Meeting: Other Items of Interest. Rosie reported that we will have a guest speaker next month to discuss proposed sub-prime lending regulation. Ken Sayre-Peterson from DFI reported that they have approval from the Governor's Office to submit AB 1301 which is a series of amendments to modernize Division 1 of the Financial Code for State Banks. The concept is to allow business decisions to remain with banks versus having those subjected to regulatory approval unless the bank is in trouble. The text of the bill should be available by the end of August. The bill will not be pushed until January. However it is expected that it will be non-controversial and there will be no changes to consumer regulation. The bill is more of a deregulation and modernization attempt.

9. Report on Cohen vs. J.P. Morgan. Will Stern reported on the recent decision in *Cohen vs. JP Morgan Chase & Company,* a case from the US Court of Appeals for the 2nd Circuit (copy attached). This case essentially states that no person shall give, accept a portion or percentage of any charge made … for settlement services. Other Circuits, including the Second Circuit, had previously held in the context of RESPA cases that both a culpable giver and accepter of the fee in order for there to be a violation of Section 8(b). In other words a solitary provider cannot be in violation of 8(b). The Second Circuit, in *Kruse vs. Wells Fargo Home Mortgage,* 383 F.3d 49 (2004) adopted that rule. So the question in this case is whether you could have a violation of Section 8(b) where there is only one payor but the payor allegedly performs no services whatsoever. Chase argued, that from the Kruse ruling, there cannot be a violation of 8(b) under those circumstances. The issue framed by the Second Circuit is that the ruling in Kruse does not proscribe fees for services where there is no service actually performed whether or not the charge is divided with another payee or not. The Court concluded that the plaintiff's adoption of Section 8(b) is reasonable: "We now hold that HUD's Policy Statement reasonably interprets § 8(b) comprehensively to prohibit unearned fees, whether reflected in a charge divided among multiple parties or an undivided charge from a single lender, as in this case."

10. Update on BSA-AML. Maureen Young of Bingham McCutcheon reported on two recent enforcement actions under the Bank Secrecy Act, as follows (news items attached). There have been two recent enforcement actions. One is the $65 million total in fines against Amex in connection with a deferred prosecution agreement. The other is an announcement by UBOC reserving $10 million in the expectation that fines will be assessed in connection with C & D.

These recent actions along with continued development in the regulations indicates that BSA continues to be an area of high risk for banks. These actions were the result of serious deficiencies noted over a period of years that were not satisfactorily resolved. Action can be expected if there is an inadequate program established, or repeated failures to file necessary reports (e.g., SARs and CTRs). These actions emphasize the importance of having a well documented SAR review process so that examiners will see a formalized approach for determining when to file, and that the reasons for declining to file are well documented.

Enforcement action also might be expected if deficiencies documented in prior examinations are not corrected. An example is flood insurance where many institutions are repeatedly examined and cited for deficiencies in the way they are disclosing and rolling out these programs. In the context of BSA, there is a potential for more significant fines.

There are both formal and informal enforcement actions (the lowest form of the latter being a MOU). The most formal enforcement action is a C & D order with fines. The choice depends on the severity of non-compliance, capability and cooperation of the institution's management, and the agency's confidence that the institution is has or will take appropriate and timely corrective action.

The FDIC reported that FINCEN is attempting to tailor the perceived BSA AML risks based on the type and size of institutions. For example, in the case of community banks, because they tend to have a much lower BSA risk profile, they should be examined in a less focused fashion (i.e., the level of scrutiny shouldn't be as rigorous). This is in contrast to statements made by law enforcement that smaller banks and credit units are also being used by money launderers and terrorists. FDIC also commended FINCEN efforts to insure money services business compliance with BSA and that those business are not discontinued merely because of regulatory review and fear of BSA enforcement action.

FINCEN has announced an effectiveness initiative that will focus on the examination process in four areas: (1) managing risk based examinations against risk based compliance (a recognition that not all institutions are subject to the same risks); (2) for MSBs, FINCEN will be working with the IRS, state regulators and federal regulators to address issues dealing with MSB access to bank services, the intent is to produce an MSB examination manual; (3) an effort will be made to make regulations more "intuitive" i.e., more accessible, perhaps by setting forth industry specific regulations in separate chapters and create a general compliance chapter that all industry sectors would read; and (4) FINCEN would work with law enforcement to provide industry feedback within 18 months after adoption or new or revised regulations.

FINCEN has also issued guidance as follows: (a) based on request by law enforcement for financial institutions to maintain accounts, i.e., keep them open and monitor for suspicious activity; and (b) institutions are to maintain supporting documentation of SARs for 5 years (which are typically made available to law enforcement, upon request --- but be certain that documents are being produced to a real supervisory agency, not plaintiff's counsel).

Final rules were also issued in August regarding the due diligence requirements for correspondent and private banking accounts pursuant to section 312 of the USA Patriot Act. The general rule for dealing with correspondent accounts and the specific rule for dealing with private banking accounts were finalized last year. These final rules essentially incorporate the regulations that were proposed.

In sum, while it is clear that the agencies are willing to enforce BSA non-compliance when serious violations are not corrected, there are also efforts at tailoring the compliance burden commensurate with risk, low or high (e.g., for smaller institutions and MSBs).

11. Adjournment. The meeting was adjourned at 11:50. The next regular meeting will be September 11, 2007 at the usual locations.

8/14/07

REVISED FDIC REGULATIONS RE: ADVERTISEMENT OF MEMBERSHIP

I. Effective Date

The FDIC regulations governing advertisement of membership (12 CFR 328) were amended November 13, 2006. Compliance with the new rule is required no later than **November 13, 2007**.

II. New Signage Requirements

The new rule eliminates the separate signage for savings associations and requires that the new official FDIC sign be used by all "insured depository institutions" (not just insured banks). "**Insured depository institutions**" include insured branches of a foreign depository institution.

- Official sign would be 7" by 3" in size with black lettering and gold background
- Includes the FDIC's internet website and leaves out the FDIC seal.
- Language above "FDIC" states "Each depositor insured to at least $100,000" (instead of "Each depositor insured to $100,000"). Thus, the new sign will remain accurate even if there are future increases in insurance coverage.

The official sign must be displayed at each station or teller where deposits are received. The official sign may also be displayed at other locations at the institution or at remote service facilities. **"Remote service facility"** includes any ATM, cash dispensing machine, POS terminal or other remote electronic facility where deposits are received.

III. Extends the advertising requirements to savings associations

The new rule requires all FDIC insured institutions, including savings associations, to include the official "Member FDIC" advertising statement in all advertisements. Previously, there was no equivalent requirement for insured savings associations.

IV. Consolidates Exceptions

There were previously 20 exceptions to the required use of the Member FDIC official advertising statement. This has been consolidated to 10 exceptions.

The FDIC felt that most of the exceptions were no longer necessary because it has defined "**advertisement**" to mean a commercial message in any medium that is designed to attract public attention or patronage to a product or business.

Also, the new rule limits its applicability to advertisements that specifically promote deposit products or generally promote banking services offered by the institution. (For example, an advertisement such as "Anytown Bank, offering a full range of banking services" would require the statement.).

The final rule was not intended to expand the applicability of the advertising requirements.

V. Restrictions on Using the "Member FDIC" Statement when Advertising Non-Deposit Products

The new rule includes a new provision restricting the use of the official advertising statement (e.g. "Member FDIC") or any other statement implying the availability of FDIC insurance when advertising "**non-deposit products**" or "**hybrid products**."

- **Non-Deposit Product** includes, but is not limited to, insurance products, annuities, mutual funds and securities. The definition is intended to apply to those products that, in the experience of the FDIC, are mistakenly viewed by customers as being FDIC-insured. Consequently, the definition explicitly excludes credit products from the definition of a "non-deposit product."

- **Hybrid Product** means a product or service that has both deposit product features and non-deposit product features (e.g., a sweep account that moves funds between an FDIC-insured bank account and a money market fund investment account).

Non-Deposit or Hybrid Product Advertisements. An advertisement relating **solely** to non-deposit or hybrid products may not include the official advertising statement.

Mixed Advertisements. An advertisement relating to **both** insured deposit products and non-deposit or hybrid products must **clearly segregate** the official advertising statement from that portion of the advertisement relating to the non-deposit or hybrid product.

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Juarez v. **Arcadia** Financial, Ltd.
Cal.App. 4 Dist.,2007.

Court of Appeal, Fourth District, Division 1, California.
Sergio **JUAREZ** et al., Plaintiffs and Appellants,
v.
ARCADIA FINANCIAL, LTD., Defendant and Respondent.
No. D048640.

June 26, 2007.

Background: Car buyers who purchased their vehicle under a conditional sale contract brought action, individually and on behalf of a class, against creditor after their vehicle was repossessed and sold, alleging that creditor violated the Unfair Competition Law (UCL) by failing to comply with requirements of Rees-Levering Automobile Sales Finance Act. The Superior Court, San Diego County, No. GIS16196, William S. Cannon, J., denied buyers' motion to compel discovery and granted summary judgment in favor of creditor as to buyers' class claims. Buyers appealed.

Holdings: The Court of Appeal, Aaron, J., held that:

(1) notice of intention (NOI) provided by creditor did not inform buyers of "all conditions precedent" to reinstatement of the conditional sale contract, as required by the Rees-Levering Automobile Sales Finance Act, and

(2) buyers were entitled to discovery of information regarding any profits the creditor made from payments it allegedly wrongfully obtained from buyers.

Reversed.

West Headnotes

[1] Secured Transactions 349A 230

349A Secured Transactions
349AVII Default and Enforcement
349Ak229 Disposition of Collateral
349Ak230 k. Notice. Most Cited Cases

Notice of intention (NOI) provided by creditor to defaulting car buyers prior to disposing of their repossessed vehicle did not inform buyers of "all conditions precedent" to reinstatement of the conditional sale contract, as required by the Rees-Levering Automobile Sales Finance Act, where the NOI informed buyers that, in order to reinstate their contract, they had to pay creditor "all past due installments, late payment penalties, repossession costs, resale expenses and storage fees (if any)," and a repossession fee to local law enforcement agency, but did not include any specific dollar amounts. West's Ann.Cal.Civ. Code § 2983.2(a)(2). *See 4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 250; Cal. Jur. 3d, Consumer and Borrower Protection Laws, § 427 et seq.*

[2] Antitrust and Trade Regulation 29T 193

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk193 k. Sale. Most Cited Cases

The legislative purpose in enacting the Rees-Levering Automobile Sales Finance Act was to provide more comprehensive protection for the unsophisticated motor vehicle consumer. West's Ann.Cal.Civ. Code § 2983 et seq.

[3] Statutes 361 184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

When more than one construction of a statute is possible, courts should favor the construction that best supports the purposes sought to be achieved by the statute.

[4] Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
When construing a statute, the purpose sought to be achieved and evils to be eliminated have an important place in ascertaining the legislative intent.

[5] Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
Statutes should be interpreted to promote rather than defeat the legislative purpose and policy.

[6] Secured Transactions 349A ⚿230

349A Secured Transactions
349AVII Default and Enforcement
349Ak229 Disposition of Collateral
349Ak230 k. Notice. Most Cited Cases
In the notice of intention (NOI) sent to defaulting car buyers by creditor under conditional sale contract prior to disposing of buyers' repossessed vehicle, creditor is required by the Rees-Levering Automobile Sales Finance Act to inform the consumer of any amounts the consumer must pay to the creditor and/or to third parties in order to obtain reinstatement of the contract, and provide the consumer with the names and addresses of those who are to be paid; the creditor must also inform the consumer regarding any additional monthly payments that will come due before the end of the notice period, as well as of any late fees, or other fees, the amount of these additional payments or fees, and when the additional sums will become due. West's Ann.Cal.Civ. Code § 2983.2(a)(2).

[7] Secured Transactions 349A ⚿230

349A Secured Transactions
349AVII Default and Enforcement
349Ak229 Disposition of Collateral
349Ak230 k. Notice. Most Cited Cases
In the notice of intention (NOI) sent to defaulting car buyer by creditor under conditional sale contract prior to disposing of buyer's repossessed vehicle, the creditor is required by the Rees-Levering Automobile Sales Finance Act to provide the buyer with all of the relevant information it possesses and/or information it has the ability to discern, concerning precisely what the buyer must do to reinstate his or her contract. West's Ann.Cal.Civ. Code § 2983.2(a)(2).

[8] Pretrial Procedure 307A ⚿36.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak36 Particular Subjects of Disclosure
307Ak36.1 k. In General. Most Cited Cases
Information regarding whether creditor under conditional sale contract for motor vehicle maintained a separate account for funds it received from defaulting car buyers for allegedly invalid deficiency claim and, if so, whether those funds earned profits, or, if not, the rate of return on the commingled funds, was sufficiently relevant for discovery purposes, in buyers' class action against creditor for its alleged violation of Unfair Competition Law (UCL) in not complying with notice requirements of Rees-Levering Automobile Sales Finance Act; buyers arguably had ownership interest in profits gained by creditor on money wrongfully held and, thus, arguably could obtain disgorgement of profits. West's Ann.Cal.Bus. & Prof.Code § 17203; West's Ann.Cal.C.C.P. § 2017.010; West's Ann.Cal.Civ. Code § 2983.2(a)(2).

[9] Antitrust and Trade Regulation 29T ⚿370

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk370 k. In General. Most Cited Cases

Antitrust and Trade Regulation 29T 388

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages
29Tk388 k. In General. Most Cited Cases

The purpose of orders entered under the Unfair Competition Law (UCL), restoring to any person in interest any money or property that might have been acquired by means of unfair competition, is to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains. West's Ann.Cal.Bus. & Prof.Code § 17203.

[10] Antitrust and Trade Regulation 29T 370

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk370 k. In General. Most Cited Cases

Antitrust and Trade Regulation 29T 388

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages
29Tk388 k. In General. Most Cited Cases

The concept of restoration or restitution, as used in the Unfair Competition Law (UCL), is not limited only to the return of money or property that was once in the possession of the plaintiff; instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest. West's Ann.Cal.Bus. & Prof.Code § 17203.

****383** Kemnitzer, Anderson, Barron & Ogilvie, Andrew J. Ogilvie, Carol McLean Brewer, San Francisco; and Michael E. Lindsey, for Plaintiffs and Appellants.
Severson & Werson, Jan T. Chilton, Regina Jill McClendon and John B. Sullivan, Irvine, for Defendant and Respondent.AARON, J.

***894** I.

INTRODUCTION

Plaintiffs Sergio and Laura Juarez appeal from a judgment entered in favor of ****384** defendant Arcadia Financial, Ltd. (Arcadia) on the Juarezes' class claims. The Juarezes filed an action against Arcadia in which they asserted both individual claims and claims brought on behalf of a class, pursuant to the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et. seq.). The Juarezes allege that Arcadia engaged in unlawful, unfair and fraudulent business practices by violating the requirements of the Rees-Levering Automobile Sales Finance Act (Rees-Levering or the Act) (Civ.Code, § 2983 et. seq.) FN1

FN1. Further statutory references are to the Civil Code unless otherwise indicated.

Rees-Levering provides a detailed framework that governs conditional sale contracts for motor vehicles. Under the Act, defaulting buyers whose cars have been repossessed by a creditor must be given the opportunity to redeem their vehicles by paying the full balance due under the contract. The Act also requires that defaulting buyers be given the opportunity, in many circumstances, to reinstate their contracts by curing the default and meeting certain other conditions set by the creditor. From the buyer's perspective, the option of reinstating a contract is often preferable to redemption, because reinstatement allows the buyer to recover the car

without having to pay the full balance due on the contract, as is required in order to redeem the vehicle.

The Act requires that creditors provide a defaulting buyer with a notice of intention (NOI) to dispose of the repossessed vehicle. To ensure that a defaulting buyer is made aware of his or her right to redeem or reinstate prior to the creditor disposing of the vehicle, the Act requires that creditors include in the NOI information about the buyer's right to redeem or reinstate. FN2 The act further requires that the NOI set forth "all the conditions precedent" to reinstatement.

> FN2. There are limited circumstances in which a creditor does not have to allow the defaulting buyer the opportunity to reinstate the contract. (§ 2983.3, subd. (b).) The creditor must notify defaulting buyers who are not given the option to reinstate their contracts of the reasons why reinstatement is not an available option for them. (§ 2983.2, subd. (a)(2).)

The Juarezes contend that the notices Arcadia sends to defaulting buyers violates the requirement that an NOI inform the buyer of "all the conditions ***895** precedent" to reinstatement because Arcadia's NOI's do not inform defaulting parties of the dollar amounts necessary to reinstate their contracts. In their complaint, the Juarezes seek the return of money Arcadia obtained by collecting deficiency claims and deficiency judgments pursuant to the defective NOI's, from buyers who ultimately did not redeem their vehicles or reinstate their contracts.

Arcadia moved for summary judgment on the class claims, asserting that the relevant facts were undisputed and that the Juarezes' class claims failed as a matter of law because Arcadia's NOI satisfies the requirements of Rees-Levering. The trial court agreed that there were no material facts in dispute and concluded that Arcadia's NOI's comply with the requirements of section 2983.2, subdivision (a)(2), even though the notices do not include the dollar amounts required to reinstate the contract.

On appeal, the Juarezes contend that the trial court erroneously interpreted the meaning of the phrase "all the conditions precedent" as it is used in Rees-Levering in concluding that Arcadia's generic description of the types of things a consumer must do to reinstate a contract satisfy the requirement that the NOI set forth "all the conditions precedent." Arcadia contends****385** that Rees-Levering requires that it provide the buyer with "only a general statement of the acts or events that must occur before the contract is reinstated," and that the Act does not require that Arcadia provide defaulting buyers with more specific information as to how they can reinstate their contracts.

The Juarezes also challenge the trial court's denial of their motion to compel Arcadia to provide responses to three interrogatories seeking information as to how Arcadia maintained the funds it is alleged to have wrongfully collected from the plaintiff class and whether those funds earned profits. The trial court denied the Juarezes' request for responses to these interrogatories on the basis that the plaintiffs "do not have an ownership interest" in the "lost profits" they seek.

We conclude that Arcadia's NOI's are insufficient under Rees-Levering. Arcadia's recitation of the general conditions for reinstatement does not adequately or reasonably apprise the consumer of "all the conditions precedent" to reinstatement.

We further conclude that the trial court should have granted the plaintiffs' motion to compel discovery regarding Arcadia's accounting practices and any profits it made from payments it is alleged to have wrongfully obtained from plaintiffs.

***896** II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The Juarezes' experience with Arcadia*

In December 1999, the Juarezes purchased a used

Isuzu Rodeo from Ron Baker Chevrolet under a conditional sales contract that obligated them to make monthly payments. After the Juarezes purchased the Isuzu, the dealer assigned its rights in the conditional sales contract to Arcadia. On July 10, 2003, Arcadia repossessed the Isuzu, based on Arcadia's belief that the Juarezes had failed to make two car payments.[FN3]

> FN3. The Juarezes originally disputed Arcadia's claim that they were delinquent in making their payments for the Isuzu.

On the day their vehicle was repossessed, the Juarezes each made separate telephone calls to Arcadia to find out how they could get it back. The Juarezes were each told that in order to recover their vehicle, they would have to pay $14,000, which was the balance remaining on their contract. The Juarezes were not told that they had the right to reinstate the contract for an amount less than the full contract balance.

A few days after the vehicle was repossessed, the Juarezes received Arcadia's NOI, which was dated July 11, 2003. The postmark on the envelope in which the NOI arrived bore a postmark of July 15, 2003, and had an out-of-state zip code.[FN4] The Juarezes do not remember on what date they received the NOI.

> FN4. The zip code on the postmark appears to be 48195.

The NOI informed the Juarezes that Arcadia had taken possession of the Isuzu and that it was planning to dispose of the vehicle 20 days from the date of the letter. In the first paragraph, the NOI informed the Juarezes that they "have the right to redeem the motor vehicle by paying the undersigned at the address indicated below the full amount shown below as 'Total Due,' within 20 days of the date of this notice, unless extension is granted as provided below." According to the NOI, the ****386** Juarezes would be required to pay a total of $13,763.06 to redeem their car.

On page two of the letter, next to the statement, "You may reinstate the contract within 20 days of the date of this notice under the following conditions ..." was a box marked with an "x." The conditions listed under this statement were "[p]ayment of all past due installments, late payment ***897** penalties, repossession costs, resale expenses and storage fees (if any), and payment of repossession fee to local law enforcement agency." While some dollar figures were included in the redemption section of the NOI, the notice did not inform the Juarezes of any amounts they would have to pay to *reinstate* their contract.

The Juarezes attempted to use the figures that were provided in the redemption section of the NOI to calculate how much they would have to pay to reinstate their contracts. They concluded that the amount required to reinstate was $784.50. The Juarezes sent that amount to Arcadia by overnight delivery on July 30, 2003. Arcadia retained the $784.50 from the Juarezes, but did not inform the Juarezes that this amount was insufficient for reinstatement.

The Juarezes waited to hear from Arcadia. On August 6, after not having heard from Arcadia, Laura called Arcadia to inquire about the status of the repossession. Laura's call went to an answering machine. She left a message asking that someone call her back. Arcadia did not return the call until August 12. On that date, an Arcadia representative told Sergio that the Juarezes would have to pay an additional $400 in order to get the Isuzu back. The representative did not mention anything about the local law enforcement fee or the towing fee that the Juarezes would also have to pay in order to reinstate the contract.

Arcadia ultimately sold the Juarezes' vehicle. Arcadia alleges in its cross-complaint that the Juarezes still owe an unpaid balance of $12,942.54 on the contract.

2. *Discovery from Arcadia*

The Juarezes deposed Wendy Wolter, Arcadia's director of operations, who Arcadia had identified as the person most knowledgeable about the case.

Wolter testified that Arcadia knew exactly how much money was required for reinstatement of the Juarezes' contract when it sent the NOI to them, but that it did not include that figure in the notice. During her deposition, Wolter calculated that as of the date of the NOI, the Juarezes would have had to pay $784.50 to reinstate the contract. She further testified that the Juarezes would not have been required to pay a local law enforcement fee because law enforcement agencies charge a fee only when they have had to impound a vehicle, and the Juarez's vehicle had not been impounded Two months later, Wolter revised her deposition testimony to state that the local law enforcement fee in the Juarezes' case was $15, and altered her statement about when a law enforcement agency charges a fee to add, "If it is impounded ... for whatever reason or repossessed." The $784.50 Wolter had calculated during her deposition as the full payment amount did not include the $15 law enforcement fee.

***898** In its summary judgment motion, Arcadia asserted that at the time the Juarezes' NOI was generated,[FN5] the Juarezes could have reinstated their contract for $784.50. However, this figure did not include the law enforcement fee. Arcadia argued that although the Juarezes had sent Arcadia ****387** $784.50, Arcadia did not receive the money until after another installment payment of $371.92 had come due, and another late fee of $18.59 had been assessed. In its responses to interrogatories, Arcadia identified an additional fee that the Juarezes apparently also owed-$75.00 for "repossession expenses (transportation fee to the auction)."

> FN5. The date of the notice and the date it was mailed were different.

B. *Procedural background*

The Juarezes initially filed an individual action against Arcadia for conversion and related claims. On September 16, 2004, the Juarezes amended their complaint to add class claims pursuant to the UCL, as set forth in Business and Professions Code sections 17200.

The Juarezes alleged that Arcadia had violated the UCL by engaging in unlawful, unfair and fraudulent business practices with regard to the NOI it sent to consumers after repossessing their vehicles. Specifically, the Juarezes alleged that Arcadia's NOI was unlawful because it failed to meet the requirements of the Act in that it did not adequately inform consumers as to the conditions precedent to reinstatement of their contracts. The Juarezes further alleged that Arcadia's practices with regard to the NOI were fraudulent and unfair, in that Arcadia suggests to consumers that they can reinstate their contracts if they use the numbers provided in the redemption section of the NOI to calculate what they owe for reinstatement, but fails to inform the consumer that there may be additional fees, such as a law enforcement fee, that the consumer must pay in order to reinstate a contract.

On April 29, 2005, the trial court certified a class in the Juarezes' action. The class was defined as "all California consumers to whom Arcadia sent post-repossession Notices that did not include the specific figure necessary to cure the default dated November 1, 2002 through the present date, and against whom Arcadia sought a deficiency at any time, or who made post-repossession payments to Arcadia." The class excluded those individuals who had redeemed their vehicles or whose contracts had been reinstated.

On December 28, 2005, the trial court denied the Juarezes' motion to compel Arcadia to provide information regarding the profits it made as a result of deficiency payments it obtained from class members.

In late 2005, Arcadia moved for summary adjudication of the class claims. Arcadia argued that Rees-Levering does not require that an NOI set forth the ***899** amounts necessary to reinstate a contract, and that its statement of what the consumer would have to do to reinstate was sufficient under the Act.

The trial court granted Arcadia's motion for summary adjudication of the class claims on March 17, 2006. The Juarezes appeal from the court's order

granting summary adjudication of the class claims, and seek review of that order as well as the trial court's order denying the Juarezes' motion to compel Arcadia to disclose the profits it made from funds paid to Arcadia by class members. On August 30, 2006, the trial court filed its final judgment on the class claims. FN6

FN6. The trial court entered a final judgment as to the class claims after the Juarezes filed their notice of appeal from the order granting summary judgment on the class claims. We exercise our discretion and treat the notice of appeal as having been filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(e)(2) ["The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment"].)

****388** III.

DISCUSSION

A. *Summary judgment on the class claims was not proper*

The parties agree that the issue in this appeal is whether an NOI must state the specific amount a buyer must pay for reinstatement in order to comply with section 2983.2, subdivision (a)(2). The relevant statutory language provides that the NOI must "[s]tate[ ] either that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice *and all the conditions precedent thereto* or that there is no right of reinstatement and provide[ ] a statement of reasons therefor." (§ 2983.2, subd. (a)(2), italics added.)

The Juarezes contend that the notices Arcadia sends to defaulting buyers do not provide adequate information about the conditions precedent to reinstatement because the NOI's fail to inform consumers of the amounts they must pay to reinstate their contracts. Arcadia contends that Rees-Levering requires that it provide "only a general statement of the acts or events that must occur before the contract is reinstated." We conclude that in requiring creditors to state "all the conditions precedent" to reinstatement, the Legislature intended that creditors provide sufficient information to defaulting buyers to enable them to determine precisely what they must do in order to reinstate their contracts, including stating the amounts due, to whom they are due, the addresses and/or contact information for those parties, and any other specific actions the buyer must take.

***900** 1. *Legal standards*

We review de novo the trial court's interpretation of section 2983.2, subdivision (a)(2). (See *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916, 129 Cal.Rptr.2d 811, 62 P.3d 54.)

In construing any statute, "[w]ell-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law. [Citation.] We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the [statute] should be given their ordinary and usual meaning and should be construed in their statutory context. [Citations.] These canons generally preclude judicial construction that renders part of the Act 'meaningless or inoperative.' [Citation.]" (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715-716, 3 Cal.Rptr.3d 623, 74 P.3d 726.)

"The language is construed in the context of the statute as a whole and the overall statutory scheme, so that we give ' "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." ' [Citation.] 'Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent

prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].' [Citation.]" (*In re Ogea* (2004) 121 Cal.App.4th 974, 980-981, 17 Cal.Rptr.3d 698.)

****389** Where the language of a statute is clear and unambiguous, we follow the plain meaning of the statute, and need not examine other indicia of legislative intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) If language in a statute is ambiguous, "we must determine its meaning and scope. [Citation.] In doing so, we may look to 'extrinsic sources, including the ostensible objects to be achieved.... In such situations, we strive to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purposes.... [Citation.]' [Citation.]" (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1130, 13 Cal.Rptr.3d 616 (*Austin P.*).)

***901** 2. *Interpreting section 2983.2, subdivision (a)(2) to require that Arcadia provide specific information about "all the conditions precedent" to reinstatement is more consistent with the legislative purpose of the Act than is the interpretation Arcadia advances*

[1] The trial court concluded that Arcadia's NOI comports with the statutory requirement that Arcadia inform the consumer of "all the conditions precedent" to exercising the right to reinstate the contract. Arcadia's NOI provides: "You may reinstate the contract within 20 days of the date of this notice under the following conditions: [¶] Payment of all past due installments, late payment penalties, repossession costs, resale expenses and storage fees (if any), and payment of repossession fee to local law enforcement agency." The NOI provides no further information about how the consumer can reinstate his or her contract. As the trial court noted, it is undisputed that Arcadia does not include any specific dollar amounts in the reinstatement section of the NOI that would inform buyers as to how much they must pay in order to reinstate their contracts.

Construing the words in the context of the statutory scheme as whole, we conclude that Arcadia's NOI does not meet the requirements of Rees-Levering.

a. *Rees-Levering is a consumer protection act*

[2] "The legislative purpose in enacting the Rees-Levering Act was to provide more comprehensive protection for the unsophisticated motor vehicle consumer." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 608, 218 Cal.Rptr. 15 (*Cerra*), citing the Final Rep. of the Assem. Interim Com. on Finance and Insurance, 15 Assem. Interim Com. Reps. No. 24 (1961 Reg. Sess.) as quoted in *The Rees-Levering Motor Vehicle Sales and Finance Act* (1962) 10 UCLA L.Rev. 125, 127.) To support this purpose, the Legislature provides a defaulting buyer the right to reinstate his or her contract, subject to certain exceptions: "If after default by the buyer, the seller ... repossesses ... the motor vehicle, any person liable on the contract shall have a right to reinstate the contract ...." (§ 2983.3, subd. (b).)

Section 2983.2, subdivision (a) details the information creditors must provide to buyers in the NOI. Subdivision (a) provides in part:
"Except where the motor vehicle has been seized as described in paragraph (6) of subdivision (b) of Section 2983.3, any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, at least 15 days' written notice of intent to dispose of a repossessed or surrendered motor vehicle shall be given to all persons liable on the contract. ***902** The notice shall be personally served or shall be ****390** sent by certified mail, return receipt requested, or first-class mail, postage prepaid, directed to the last known address of the persons liable on the contract. If those persons are married to each other, and, according to the most recent records of the seller or holder of the contract, reside at the same address, one notice ad-

dressed to both persons at that address is sufficient. Except as otherwise provided in Section 2983.8, those persons shall be liable for any deficiency after disposition of the repossessed or surrendered motor vehicle only if the notice prescribed by this section is given within 60 days of repossession or surrender and does all of the following:

"(1) Sets forth that those persons shall have a right to redeem the motor vehicle by paying in full the indebtedness evidenced by the contract until the expiration of 15 days from the date of giving or mailing the notice and provides an itemization of the contract balance and of any delinquency, collection or repossession costs and fees and sets forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice.

"(2) States either that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice and all the conditions precedent thereto or that there is no right of reinstatement and provides a statement of reasons therefor.

"(3) States that, upon written request, the seller or holder shall extend for an additional 10 days the redemption period or, if entitled to the conditional right of reinstatement, both the redemption and reinstatement periods. The seller or holder shall provide the proper form for applying for the extensions with the substance of the form being limited to the extension request, spaces for the requesting party to sign and date the form, and instructions that it must be personally served or sent by certified or registered mail, return receipt requested, to a person or office and address designated by the seller or holder and received before the expiration of the initial redemption and reinstatement periods.

"(4) Discloses the place at which the motor vehicle will be returned to those persons upon redemption or reinstatement.

"(5) Designates the name and address of the person or office to whom payment shall be made.

"(6) States the seller's or holder's intent to dispose of the motor vehicle upon the expiration of 15 days from the date of giving or mailing the notice, or if by mail and either the place of deposit in the mail or the place of address ***903** is outside of this state, the period shall be 20 days instead of 15 days, and further, that upon written request to extend the redemption period and any applicable reinstatement period for 10 days, the seller or holder shall without further notice extend the period accordingly."

b. *The phrase "all the conditions precedent" is ambiguous with regard to the level of specificity required in the NOI*

The phrase "all the conditions precedent" does not, in itself, provide insight as to precisely what information regarding reinstatement the Legislature intended that creditors be required to provide in the NOI. Black's Law Dictionary defines a "condition precedent" as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something****391** promised arises." (Black's Law Dict. (8th ed. 2004) p. 312, col. 2.) Arcadia suggests that the Legislature's use of the phrase "conditions precedent," suggests that it intended to require only a very general, basic description of the acts a defaulting buyer must perform in order to reinstate the contract. Arcadia derives its theory from the fact that the statute requires that the NOI include the "conditions" of reinstatement, and does not require that the NOI state the "amounts" required for reinstatement. Arcadia further contends that the phrase "conditions precedent" refers to "acts or events" and not to "numbers, amounts, sums or totals." Arcadia asserts that because the Legislature used the word "conditions," and did not use the word "amounts," it must not have intended that NOI's provide buyers any information beyond the general categories of actions that the buyer must take, and that the Legislature did not intend that NOI's provide consumers with the specific dollar amounts they must pay to reinstate their contracts.

Arcadia's argument on this point is not persuasive. The requirement that the NOI set forth the "all the conditions precedent" to reinstatement does not imply anything about whether there is or is not a requirement that the NOI provide "numbers, amounts, sums or totals" with regard to reinstatement. It is

possible to describe a "condition precedent" in a manner that involves references to numbers, amounts, and sums, or instead to describe the condition more generally, as any generic type of act or event that must occur prior to the fulfillment of a promise or duty. For example, a statement that the consumer must "pay a late penalty fee of $15.00" to reinstate a contract is as much a description of an act that is required of a defaulting buyer to reinstate his or her contract as is the statement that the consumer must "pay a late penalty fee." Thus, two different descriptions of a condition precedent can refer to the same act, but one may be more specific than the other.

The fact that the Legislature used the phrase "all the conditions precedent" reveals nothing about the level of specificity the Legislature intended that ***904** NOI's provide in describing those conditions. The phrase is thus ambiguous. The question this ambiguity raises is what level of specificity the Legislature intended that creditors be required to provide to defaulting buyers when notifying them of "all the conditions precedent" to reinstatement of their contracts. For the reasons we discuss in the following section, we conclude that the Legislature intended to require more specificity than Arcadia's notices provide.

c. *The most reasonable interpretation of the phrase "all the conditions precedent" is that it requires creditors to provide enough information to allow buyers to determine precisely what they must do in order to reinstate their contracts*

[3][4][5] In interpreting the meaning of the phrase "all the conditions precedent" as used in Rees-Levering, we begin with the rule that when more than one construction is possible, courts should favor the construction that best supports the purposes sought to be achieved by the statute:
" 'Taking into consideration the policies and purposes of the act, the applicable rule of statutory construction is that the purpose sought to be achieved and evils to be eliminated have an important place in ascertaining the legislative intent. [Citation.] Statutes should be interpreted to promote rather than defeat the legislative purpose and policy. [Citation.] "[I]n the interpretation of statutes,****392** when two constructions appear possible, this court follows the rule of favoring that which leads to the more reasonable result." [Citation.] ... "That construction of a statute should be avoided which affords an opportunity to evade the act, and that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or to defeat compliance with its terms, or any attempt to accomplish by indirection what the statute forbids." ' " (*Cerra, supra*, 172 Cal.App.3d at p. 608, 218 Cal.Rptr. 15, quoting *Freedland v. Greco* (1955) 45 Cal.2d 462, 467, 289 P.2d 463.)

[6] Reading the phrase "all the conditions precedent" in subdivision (a)(2) of section 2983.2 in the context of the overall statutory scheme, and considering the Legislature's purpose in enacting Rees-Levering, it seems clear that the Legislature intended that the NOI provide a level of specificity as to the conditions precedent to reinstatement sufficient to inform the consumer-without need for further inquiry-as to exactly what the buyer must do to cure the default. Thus, the statute requires that a creditor inform the consumer of any amounts the consumer must pay to the creditor and/or to third parties, and provide the consumer with the names and addresses of those ***905** who are to be paid. FN7 The creditor must also inform the consumer regarding any additional monthly payments that will come due before the end of the notice period, as well as of any late fees, or other fees, the amount(s) of these additional payments or fees, and when the additional sums will become due. If the creditor does not provide the defaulting buyer with this information, the creditor has not informed the defaulting buyer of "all the conditions precedent" to reinstatement of the contract.

> FN7. Section 2983.2, subdivision (a)(5) requires that the NOI "[d]esignate[ ] the name and address of the person or office to whom payment shall be made."

This interpretation is more reasonable than the in-

terpretation Arcadia offers. The general description Arcadia provides in its notice regarding the types of things a defaulting buyer must do to reinstate a contract serves to frustrate the purpose of Rees-Levering, not to promote it. Under Arcadia's interpretation, the burden is on the consumer to gather sufficient, accurate information as to how he or she can fulfill the conditions of reinstatement. Considering that Arcadia has in its possession the relevant information the defaulting purchaser needs in order to reinstate a contract, requiring the consumer to obtain this information by contacting Arcadia and/or by gleaning it from other sources places a significantly greater burden on the consumer than any burden that would be placed on Arcadia from requiring that it disclose this information to defaulting buyers in writing at the beginning of the process.

The burden that Arcadia's NOI places on the consumer makes it more difficult for a consumer to exercise the right to reinstate, and reduces the amount of time the consumer has to fulfill the conditions by requiring that the consumer spend time tracking down the relevant information. In view of the fact that the Legislature required that creditors notify defaulting buyers of “all the conditions precedent” (§ 2983.2, subd. (a)(2), italics added) to reinstatement in an effort to “provide more comprehensive protection for the unsophisticated motor vehicle consumer” (*Cerra, supra*, 172 Cal.App.3d at p. 608, 218 Cal.Rptr. 15), it would be unreasonable to conclude that the Legislature intended ****393** that such a burden be placed on consumers.

The Juarezes' situation is a perfect example of how Arcadia's interpretation serves to frustrate the goals of Rees-Levering. The NOI that Arcadia sent the Juarezes informed them that in order to reinstate their contract, they would have to pay Arcadia “all past due installments, late payment penalties, repossession costs, resale expenses and storage fees (if any), and [a] repossession fee to [a] local law enforcement agency.” This information was essentially meaningless to the Juarezes in the absence of additional, more specific information. When faced with an NOI that gave them virtually no useful information as to what they would have to do to have their contract ***906** reinstated, the Juarezes attempted to ascertain the dollar amount necessary for reinstatement, based on other information contained in the NOI. After sending Arcadia this estimated amount, the Juarezes waited to hear from Arcadia. When they did not hear from Arcadia, they called to inquire about the status of the reinstatement. Their call was not returned for nearly a week. When a representative from Arcadia finally did call the Juarezes, the representative informed them that they would have to pay more money than the amount they had sent to Arcadia because another payment date had passed. The representative failed to tell the Juarezes about the local law enforcement fee. All of this impeded the Juarezes' ability to reinstate their contract.

By providing consumers like the Juarezes incomplete information as to what they must do to have their contracts reinstated, and thus requiring consumers to inquire of Arcadia as to what they must do to reinstate, Arcadia not only makes it more difficult for consumers to reinstate their contract, but also effectively reduces the time the Act provides to consumers to remedy any defaults. Under Arcadia's interpretation of the statute, an unscrupulous creditor could take advantage of this situation by simply evading a consumer's requests for the necessary information.[FN8] Arcadia's interpretation would have the effect, whether intended or not, of shortening the statutory time period for reinstatement-a result that directly conflicts with the explicit time frames the Legislature provided in subdivisions (a)(2) and (a)(6) of section 2983.2. Because we must “ ‘give significance to every word, phrase, sentence and part of an act in pursuing the legislative purpose’ ” (*People v. Canty* (2004) 32 Cal.4th 1266, 1276, 14 Cal.Rptr.3d 1, 90 P.3d 1168), we should avoid adopting an interpretation of the phrase ****394** “all the conditions precedent” that has the effect of shortening or possibly nullifying the statutory time periods set forth in the Act.

FN8. The Juarezes did not receive a call back from Arcadia about the NOI until approximately six days after they called to

> inquire. In addition, the NOI that was sent to the Juarezes was not postmarked until at least four days after the date printed on the NOI. Further, although the statute provides that the Juarezes were to have 20 days after the date of "giving or mailing" the notice to redeem or reinstate, the NOI erroneously informed the Juarezes that they had to redeem or reinstate "within 20 days of the date of this notice."
>
> If Arcadia had a practice of not mailing the NOI on the *same* date identified as the date printed on the NOI, then Arcadia's telling consumers that the time period commenced on the date of the NOI was an inaccurate statement of the law, and misled consumers about how much time they had to remedy the default. Some consumers might have forgone the opportunity to redeem their vehicles or reinstate their contracts because they believed they would not be able to fulfill the conditions until after the time period stated in the NOI had elapsed. Further, if Arcadia relied on the date stated in the NOI, and not the date of mailing, in determining when it could lawfully dispose of a repossessed vehicle, Arcadia may have disposed of vehicles without giving consumers the required number of days to remedy any default.

***907** Arcadia's interpretation is unreasonable for another reason as well. Under its interpretation, a creditor would *never* be required to inform the consumer of any of the amounts he or she must pay in order to reinstate the contract, *even if* the consumer called or wrote to inquire about this information. This is because the only requirement Rees-Levering imposes on creditors concerning their duty to notify a consumer about reinstating his or her contract is the notice requirement found in section 2983.2, subdivision (b), which requires notification of "all the conditions precedent." There is nothing in the statute that requires the creditor to provide the buyer with other information regarding reinstatement at any point after it has notified the consumer through the NOI. Under Arcadia's interpretation of the statute, the phrase "all the conditions precedent" as used in section 2983.2, subdivision (b) would require only that the creditor provide the consumer with the most general information as to what the consumer must do to reinstate the contract. If general information were all that is required under section 2983.2, subdivision (b), then a buyer would never have the right to be told precisely how much he or she must pay in order to reinstate the contract. Without this specific information, a consumer would not be able to exercise the right of reinstatement. Thus, under Arcadia's interpretation of the Act, the defaulting buyer's ability to reinstate is left to the discretion of the creditor, who will be in the position of deciding whether to provide a consumer the specific information necessary to allow him or her to reinstate. Such a result would clearly conflict with the statutory scheme as a whole. It would be unreasonable to conclude that the Legislature intended that consumers not be provided sufficient information to be able to exercise their rights under the statute. Since section 2983.2, subdivision (a)(2) is the only provision that requires creditors to provide information to the consumer, the most reasonable interpretation of that provision is that it requires creditors to provide notice sufficient to allow the consumer to exercise the right to reinstate. (See *Freedland v. Greco, supra*, 45 Cal.2d at p. 468, 289 P.2d 463 [" 'That construction of a statute should be avoided which affords an opportunity to evade the act, and that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or to defeat compliance with its terms, or any attempt to accomplish by indirection what the statute forbids' "].) FN9

> FN9. At oral argument, counsel for Arcadia stated that the industry (i.e., creditors under conditional sale contracts for vehicles) prefers to reinstate contracts over having to seek deficiency judgments against defaulting buyers. If this is the case, the industry should have little quarrel with our interpretation of the statute, since it is more likely to result in reinstatements than is Arcadia's proffered interpretation.

We find support for our view in *Cerra, supra*, 172 Cal.App.3d 604, 218 Cal.Rptr. 15. The trial court rejected *Cerra* as supporting the Juarezes' position because the *Cerra* court "was not required to and did not decide whether an NOI must ***908** state the amount necessary to reinstate the contract." It is true, as the trial court observed, that the *Cerra* court was not considering the level of specificity required by the use of the phrase "all the conditions precedent" in subdivision (a)(2) of section 2983.2. Rather, the issue in *Cerra* was whether a defaulting buyer has a claim for conversion if the creditor gave insufficient ****395** notice or denied the right of reinstatement. (*Cerra, supra*, 172 Cal.App.3d at p. 608, 218 Cal.Rptr. 15.) The *Cerra* court concluded that a defaulting buyer who is not provided with proper notice of his right to reinstate the contract may bring an action for conversion against the creditor who repossessed the car. (*Id.* at pp. 608-609, 218 Cal.Rptr. 15.) The *Cerra* court observed that the notice that was provided in that case "did not even come close to complying with Civil Code section 2983.2" (*Cerra, supra*, 172 Cal.App.3d at p. 606, 218 Cal.Rptr. 15), and suggested that proper notice under section 2983.2 would include the dollar amount necessary for reinstatement.

The *Cerra* court first summarized the notice required under that provision: "The notice required to be given pursuant to section 2983.2 details the buyer's rights and the sum necessary to cure the default." (*Cerra, supra*, 172 Cal.App.3d at p. 608, 218 Cal.Rptr. 15.) The court later reiterated its concern with the creditor's failure to provide the defaulting buyer with the dollar amount required for reinstatement: "It is true that the declarations filed on behalf of Cerra do not show that he or his agents had tendered the required repossession costs, but he can hardly be faulted when he was not advised of his rights pursuant to section 2983.2 or of the amount needed to obtain reinstatement." (*Cerra, supra*, at p. 609, 218 Cal.Rptr. 15.) The *Cerra* court thus clearly interpreted the phrase "all the conditions precedent" to include notice of the specific *dollar amounts* necessary to reinstate the contract.

Arcadia argues that the Legislature could not have intended that creditors be required to provide buyers with dollar amounts the buyer must pay to reinstate the contract because there are some situations in which the creditor will not know the amounts a buyer must pay to reinstate the contract. Arcadia cites as examples situations in which the default arises as a result of the buyer's failure to keep the car free from encumbrances and liens, or as a result of the buyer's failure to maintain insurance for the car. According to Arcadia, in a situation that involves a buyer's failure to keep the car free from encumbrances and liens, the creditor will not know how much the buyer owes to a third party or parties. Similarly, Arcadia maintains that in a situation that involves a lack of insurance, the creditor will not know how much the buyer must pay for insurance.

[7] We acknowledge that there may be instances in which the creditor does not possess information about the amount a consumer must pay to a ***909** third party in order to satisfy a condition precedent to reinstatement.[FN10] HOWEVER, THE FACT That there may be some instances in which the creditor does not know the amount the defaulting buyer must pay to another party does not mean that creditors need not provide information about the amounts owed to the creditor or to third parties when the creditor *does* (or reasonably should) know those amounts. The creditor must provide the consumer with *all* of the relevant information it possesses and/or information it has the ability to discern, concerning precisely what the buyer must do to reinstate his or her contract.

> FN10. There were comments made at oral argument to the effect that a creditor who retains title to the vehicle pursuant to a conditional sales contract will often, if not always, know the dollar amount required to have a lien released.

The fact that there are a variety of possible conditions precedent to reinstatement, some of which may not involve the payment of money to the creditor, supports****396** our interpretation of the statute. It would not have been practical for the Legislature

to have attempted to craft a provision that specified *all* potential conditions precedent that might be imposed on a defaulting buyer. Rather than try to anticipate any and all such conditions a creditor might impose before allowing reinstatement, the Legislature used the phrase "all the conditions precedent" to cover the entire field.

Arcadia urges us to adopt its interpretation of the words "conditions precedent," by arguing that other provisions in Rees-Levering specify exactly what information the creditor must provide to the consumer, while this provision does not. Arcadia contrasts subdivision (a)(2) of section 2983.2 with subdivisions (a)(1) and (a)(7) of the same section. Subdivision (a)(1), which pertains to redemption, requires that the NOI "provide[ ] an itemization of the contract balance and of any delinquency, collection or repossession costs and fees and set[ ] forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice." (§ 2983.2, subd. (a)(1).) Subdivision (a)(7) requires that the NOI inform consumers that on written request the creditor "shall furnish a written accounting regarding the disposition of the motor vehicle as provided for in subdivision (b)." (§ 2983.2, subd. (a)(7).)

Contending that " '[w]here the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored' " *(Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1593, 46 Cal.Rptr.2d 674), Arcadia asserts that the "different wording of these neighboring provisions shows that the Legislature chose not to require NOI's to set forth the amount the customer must pay to reinstate." We disagree. The difference in the ***910** wording used in the various sections of the Act is a function of the fact that these sections describe very different things. Unlike the situation in which a defaulting buyer seeks to redeem the vehicle, which requires *only* the payment of money, reinstatement might require that the defaulting buyer do things other than, or in addition to, paying money to the creditor and/or a third party. It would therefore make sense for the Legislature to require an itemization of the costs required to redeem a vehicle under subdivision (a) (1) of section 2983.2, since redemption will require the payment of these sums in every instance. This also explains why the Legislature would use the word " accounting" in subdivision (a)(7), which deals with providing the defaulting buyer with the details of the proceeds and expenses related to the disposition of the repossessed vehicle. In each instance in which the creditor disposes of a vehicle, the issues involve *only* money-i.e., whether there remains any liability or whether the defaulting buyer is entitled to any surplus remaining after all debts have been satisfied. (See § 2983.2, subd. (b).)

In contrast, the conditions precedent to reinstatement can involve things other than simply paying money to the creditor, as illustrated by defaults arising from the failure to keep the vehicle free from liens or encumbrances or the failure to maintain insurance. Thus, the Legislature used the phrase "all the conditions precedent"-a more expansive term than either "itemization" or "accounting"-when discussing what must be included in the notice that creditors are required to provide to defaulting buyers about their right to reinstate. This makes sense considering the variety of conditions that a creditor might ****397** impose before allowing a defaulting buyer to reinstate the contract.

We disagree with Arcadia's argument that "[d]isclosure of various different reinstatement amounts due at different times might prove confusing to the buyer and burdensome to the creditor." The creditor knows, or should know, how much the buyer owes, when the buyer owes it, and why the amount is owed (i.e., under what provision of the contract the assessment is being charged). Requiring the creditor to provide this information to the buyer thus should not impose an undue burden on the creditor.[FN11] According to Arcadia, "it is difficult to disclose reinstatement amounts in a clear, concise manner in an NOI even when the creditor knows those sums" because the amounts might

change if the defaulting buyer misses another payment. However, this difficulty would exist regardless of whether the creditor is preparing an NOI or talking with a consumer on the telephone, since the possibility that the reinstatement amounts could change if reinstatement does not occur by a certain date is just as true for a consumer who calls the creditor to ask for ***911** more details about how to reinstate his or her contract as it is for a consumer who receives an NOI. Arcadia appears to agree that it is reasonable to expect the creditor's telephone representative to alert the buyer to the fact that another payment may be due before the buyer can fulfill all of the other conditions precedent, and to inform the buyer that late penalties will apply if that payment is not received by a certain date. There is no reason why the NOI cannot do the same.

> FN11. Arcadia acknowledges that it will provide this information to the consumer at some point in time when it suggests that the consumer call the creditor after receiving the NOI to obtain this relevant information over the telephone.

Although Arcadia asserts otherwise, there is no reason to believe a consumer is likely to be confused by a notice that informs the consumer that if he or she wishes to reinstate the contract, he or she must pay a certain sum by a certain date, and that if the payment is not made by that date, he or she will have to pay additional sums. In fact, in its briefing Arcadia demonstrates that it would not be difficult to explain to the defaulting buyer that the amount required to reinstate might increase over time. Arcadia explains that in a case in which a buyer fails to make the next monthly payment prior to paying the amounts required for reinstatement, "[t]he reinstatement amount increases by the amount of the missed payment on its due date, by the amount of the late payment fee ten days later, and by an additional $15 on another date if the buyer's check is returned unpaid." FN12 This explanation, together with the specific information as to the amount due in the next installment and when that amount is due, would be sufficient to alert the buyer not only that the amount necessary for reinstatement might increase, but also when it will increase and by how much. Contrary to Arcadia's suggestion otherwise, this approach seems much *less* likely to confuse the buyer than the method Arcadia has been employing, which is to not inform the buyer at all about how much he or she owes at any particular time.

> FN12. Arcadia is referring to provisions of the Act that limit the fees a creditor may charge. (See § 2982, subds. (k) [allowing creditors to include in a contract a delinquency fee of up to 5 percent of the delinquent installment after the installment is delinquent for more than 10 days] and (p) [allowing creditors to impose no more than a $15 fee for returned checks so long as the contract so provides].)

****398** We do not find persuasive Arcadia's complaint that requiring "new additional disclosures" will make compliance immeasurably more difficult for creditors. The disclosures that we conclude must be included in the NOI are neither "new" nor "additional." Rather, this is information that must be disclosed to the buyer at some point in time, as Arcadia implicitly concedes by saying that the Legislature intended that consumers call creditors in order to find out the amount they must pay to reinstate. Arcadia thus also concedes that it possesses this information and that it must disclose the information to the buyer at some point if the defaulting buyer is to be able to reinstate.

***912** We therefore hold that under Rees-Levering, an NOI must inform the consumer of any amounts the consumer will have to pay to the creditor and/or to a third party to reinstate a contract. The NOI must also inform the consumer if, when, and by how much those amounts may increase as a result of additional payments coming due, or as a result of late fees or other fees and charges. In other words, creditors must provide consumers with sufficient information to allow consumers to fulfill all of the conditions the consumer must meet before a creditor will reinstate the contract. Arcadia's NOI does not satisfy these requirements.

The trial court ruled that the class could not prevail on its UCL claims against Arcadia after it determined that Arcadia's NOI complied with the requirements of Rees-Levering. Because we conclude that Arcadia's NOI is insufficient under Rees-Levering, we reverse the trial court's grant of summary judgment in favor of Arcadia on the class UCL claims.FN13

> FN13. The trial court's ruling that, as a matter of law, Arcadia's practice does not violate the UCL's prohibition against "unlawful" business practices can no longer stand. Because the court premised its rulings concerning the "unfair" and "deceptive" prongs of the UCL rulings in part on its erroneous analysis as to why Arcadia's practice did not violate Rees-Levering, our conclusion regarding Rees-Levering's notice requirements implicates those rulings as well. On remand, the trial court should consider the Juarezes' claims under all three prongs of the UCL.

B. *The information that the interrogatories request is sufficiently relevant for discovery purposes*

[8] The Juarezes contend that the trial court erred in denying their motion to compel Arcadia to provide information about any profits it made from use of the money it received from plaintiffs for "invalid deficiency claims." The three interrogatories at issue asked Arcadia (1) whether it "maintain[s] in a separate account the funds it collected from the Class Members;" (2) if it does so, whether Arcadia earned any profits on those funds; and (3) if Arcadia instead commingled the funds with general funds, what was its return on equity (which, the Juarezes maintain, is the standard measure of corporate profits). The trial court determined that the information plaintiffs sought was not relevant to the action because the plaintiffs "can be restored to the status quo ante by ordering defendant to refund whatever amounts the class was improperly induced to pay out."

The scope of discovery is intended to be very broad: "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible ***913** evidence. Discovery may relate to the claim or defense of the party seeking discovery****399** or of any other party to the action." (Code Civ. Proc., § 2017.010.)

[9] Business and Professions Code section 17203 permits "any court of competent jurisdiction" to enjoin "[a]ny person who engages, has engaged, or proposes to engage in unfair competition...." Section 17203 also authorizes courts to make such orders as "may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." "The purpose of such orders is 'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.' [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545.)

The Juarezes contend that the information they seek to discover is relevant because it may lead to evidence that would assist the court in "mak[ing] such orders or judgments ... as may be necessary to restore to any person in interest any money property, real or person, which may have been acquired by means of such unfair competition [as prohibited by the UCL]." (Bus. & Prof.Code, § 17203.) Arcadia asserts that the proposed discovery is irrelevant because a "plaintiff may not recover the defendant's profits under the UCL."

The court reached its conclusion that the information the Juarezes sought was not relevant by relying on the following language in *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 338-339, 74 Cal.Rptr.2d 55 (*Day*): "Taken in the context of the statutory scheme, the definition suggests that [Business and Professions Code] section 17203 operates only to return to a person *those measurable amounts* which are *wrongfully taken* by means of an

unfair business practice. The intent of the section is to make whole, equitably, the victim of an unfair practice." FN14 However, the *Day* court was concerned with the fact that the representative plaintiff was seeking the ***914** disgorgement of profits into a fluid recovery fund despite the fact that the public had not suffered a measurable loss as a result of the defendant's conduct:

> FN14. The *Day* court's, and other courts', discussions about using restitution to make victims "whole" in the context of a UCL action contain reasoning that is similar to the reasons a plaintiff may be awarded damages. For example, in discussing the remedial provisions in ERISA (Employee Retirement Income Security Act of 1974) in *Mertens v. Hewitt Assocs.* (1993) 508 U.S. 248, 252, 113 S.Ct. 2063, 124 L.Ed.2d 161, the United States Supreme Court commented on the distinctions between different remedies, including damages and restitution: "Section 409(a), 29 U.S.C. § 1109(a), makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: The fiduciary is personally liable for damages ('*to make good to [the] plan any losses to the plan resulting from each such breach*'), for restitution ('to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary'), and for 'such other equitable or remedial relief as the court may deem appropriate,' including removal of the fiduciary." (Italics added.) Thus, although the UCL has been interpreted to permit relief in the form of restitution, but not damages, the concept of restitution that courts have applied in the UCL context appears to bear some relationship to the historical function of "damages," rather than the historical function of "restitution."

"Even in those cases which have allowed for a fluid recovery, as opposed to a restoration to identified individuals or classes, the amount being restored has been objectively measurable as that amount which the defendant would not have received but for the unfairly competitive practice. [Citations.] [¶] ... If the court were to fashion a fluid recovery in this case, how would the amount be measured? What have respondents ****400** obtained which they are not entitled to keep? Appellants assert that the court could, if it chose to, order respondents to disgorge all the money earned from phone card sales, because if they had not advertised misleadingly, members of the public would not have purchased the cards at all. The fact remains, however, that once the cards were purchased and used, the members of the public received exactly what they paid for. The filed tariffs allow the practice of rounding up, so that a card lasts only as long as the number of full minute units debited, regardless of actual 'talk time.' This appellants do not dispute. They make clear, in fact, that they are not attacking the practice of rounding up, as to do so would trigger the application of the filed rate doctrine. That said, *there are no ill-gotten profits to restore.* Any amount taken away from respondents for services provided using properly filed tariffs would amount to a rebate. This, as we have seen, is not permitted. [¶] To summarize, the notion of restoring something to a victim of unfair competition includes two separate components. *The offending party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep.*" (*Day, supra*, 63 Cal.App.4th at pp. 339-340, 74 Cal.Rptr.2d 55, italics altered.)

The situation in this case differs from that in *Day* in significant respects. First, unlike in *Day,* in this case there is a certified class, which means that a fluid recovery fund is possible pursuant to the class action statute, despite not being available under the UCL. (See *Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 137, 96 Cal.Rptr.2d 485, 999 P.2d 718 ["In sum, the Legislature has not expressly authorized monetary relief other than restitution in UCL actions, but has authorized disgorgement into a fluid recovery fund in class actions"].)

[10] Second and more important, in this case the plaintiff class is alleged to have suffered a measurable loss. Thus, if the plaintiffs succeed in establishing UCL liability, it will be clear that Arcadia obtained something to which it was not entitled, and that the plaintiff class gave up something its members were entitled to keep. In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149, 131 Cal.Rptr.2d 29, 63 P.3d 937 (*Korea Supply*), the Supreme Court concluded that "restitutionary disgorgement" is available ***915** under the UCL. This may include monies that were not necessarily in the plaintiff's possession: "We have stated that '[t]he concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person.' [Citation.] Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest." (*Korea Supply, supra*, 29 Cal.4th at p. 1149, 131 Cal.Rptr.2d 29, 63 P.3d 937, citing *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178, 96 Cal.Rptr.2d 518, 999 P.2d 706.)

The acknowledgement in *Korea Supply* that the concept of restitution is broader than simply the return of money that was once in the possession of the person from whom it was taken is not surprising. The basic premise of this type of remedy is that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." (Rest., Restitution, § 1.) "Ordinarily, the measure of restitution is the amount of enrichment received ..., but as stated in Comment *e*, if the loss suffered differs from the amount of benefit received, *the measure of restitution may be more or* *****401** less than the loss suffered or more or less than the enrichment.*" (*Id.* at § 1, Com. a, p. 12, italics added.) FN15

> FN15. Restatement Restitution, section 1, comment *e*, page 14, provides in part: "In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched. Thus where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and not merely for the value of the property of the other with which he wrongfully dealt...."

In this case, the plaintiffs arguably have an ownership interest in any profits Arcadia may have gained through interest or earnings on the plaintiffs' money that Arcadia wrongfully held. This case is distinguishable from the cases Arcadia cites for the proposition that "[e]very case that has considered the issue has denied recovery of defendant's profits under the UCL," because in none of those cases did the plaintiff or plaintiffs establish a measurable loss or a vested interest in the profits to be disgorged. Arcadia cites *Korea Supply, supra*, 29 Cal.4th at page 1149, 131 Cal.Rptr.2d 29, 63 P.3d 937, in support of its position. In *Korea Supply*, the plaintiff sought disgorgement of profits from the defendant, a competitor of the plaintiff's who had been awarded a contract from the Korean government as to which both the plaintiff and defendant had offered bids. (*Id.* at p. 1140, 131 Cal.Rptr.2d 29, 63 P.3d 937.) After the Korean government awarded the contract to the defendant, allegations that the contract had been awarded as a result of bribes and sexual favors came to light. (*Id.* at pp. 1141-1142, 131 Cal.Rptr.2d 29, 63 P.3d 937.) The plaintiff sought to recover money the defendant received as a result of being awarded the contract at ***916** issue. (*Ibid.*) The Supreme Court rejected the plaintiffs' claim for these monies under the UCL, commenting:

"The remedy sought by plaintiff in this case is not restitutionary because plaintiff does not have an ownership interest in the money it seeks to recover from defendants. First, it is clear that plaintiff is not seeking the return of money or property that was once in its possession. KSC has not given any money to Lockheed Martin; instead, it was from the Republic of Korea that Lockheed Martin received

its profits....[¶] ... [¶] ... [Further, KSC cannot establish that it had a vested interest in the money it seeks to recover because] KSC itself acknowledges that, at most, it had an 'expectancy' in the receipt of a commission. KSC's expected commission is merely a contingent interest since KSC only expected payment if MacDonald Dettwiler was awarded the SAR contract. [Citation.] Such an attenuated expectancy cannot, as KSC contends, be likened to 'property' converted by Lockheed Martin that can now be the subject of a constructive trust." (*Korea Supply, supra*, 29 Cal.4th at pp. 1149-1150, 131 Cal.Rptr.2d 29, 63 P.3d 937.)

Each of the other cases Arcadia cites in support of its proposition is similarly distinguishable from this case. In *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1005, 1016-1020, 36 Cal.Rptr.3d 592, a plaintiff class of investors brought an action alleging that the defendant had published fraudulent stock research reports that prevented investors from having "a sound basis for evaluating" their investments. The monies as to which the plaintiffs sought disgorgement were profits and/or compensation the defendant had received from the public companies it ****402** was researching, not the investors' money. In *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 459-462, 30 Cal.Rptr.3d 210, a plaintiff representing California electricity consumers sued a number of parties who participated in the restructuring of California's electricity market, alleging, among other things, that the Perot Systems defendant aided market participants in cheating Californians. The disgorgement plaintiffs sought from Perot Systems bore no relationship to "ill-gotten gain from utility overcharges," because the plaintiff did not allege that consumers had suffered overcharges as a result of the Perot Systems' conduct. (*Id.* at p. 456, 30 Cal.Rptr.3d 210.)

In *Pegasus Satellite Television, Inc. v. DIRECTV, Inc.* (C.D.Cal.2004) 318 F.Supp.2d 968, 979 (*Pegasus Satellite*), the plaintiff had not lost to the defendant any money in which the plaintiff had a vested interest. Pegasus, a nonparty to a contract between DIRECTV and a third party, sued DIRECTV, seeking disgorgement of "launch fees" that were due to the third party, on the basis that the third party was required to pass some of the launch fees on to Pegasus pursuant to a separate agreement between Pegasus and the third party. The trial court noted that pursuant to the agreement between Pegasus ***917** and the third party, Pegasus was entitled only to launch fees that the third party "has already received from DirecTV." Thus, the court concluded, Pegasus's interest in the fees was contingent and had not vested; Pegasus could not get these contingent fees under a theory of restitution under UCL.

Similarly, in *National Rural Telecommunications Co-op. v. DIRECTV, Inc.* (2003) 319 F.Supp.2d 1059, 1079, the plaintiffs were not seeking the return of any money that had once been in the plaintiffs' possession or in which the plaintiff had a vested interest. The court framed its inquiry around whether the plaintiffs had a vested interest in the money they sought to recover from DIRECTV. As in *Pegasus Satellite*, the court concluded that the plaintiff did not have a vested interest because their "experts did not identify particular funds or monies to which Plaintiffs were allegedly entitled," and the money the plaintiffs were attempting to recover simply constituted expectation damages "for what they believe they would have obtained" if DIRECTV would have performed on its agreement with a third party. (*National Rural, supra*, 319 F.Supp.2d at p. 1080.)

Finally, in *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D.Cal.2001) 178 F.Supp.2d 1099, the pharmaceutical company plaintiff sued the pharmaceutical company defendant alleging a breach of contractual obligations to supply plaintiff with a hypertension drug and to not compete with plaintiff in that drug market. The question the trial court faced was "when the victim was never in possession of the wrongdoer's 'benefits' and never had a property interest in those 'benefits'[ ] does the remedy of restitution under [Business and Professions Code] § 17200 authorize transferring that property to the victim?" (*Watson Laboratories, supra*, at p. 1122.) The trial court answered this

question in the negative.

Thus, in all of the cases Arcadia cites to suggest that "profits" are not available to a plaintiff under the UCL, the plaintiff had not lost to the defendant any vested interest in money or property. That is not the case here. The monies the plaintiffs in this case seek to recover are monies that Arcadia is alleged to have wrongfully collected from the plaintiffs, and any interest ****403** Arcadia may have earned on these monies. The information the plaintiffs seek is, at a minimum, reasonably calculated to lead to the discovery of admissible evidence, since the plaintiffs are trying to determine whether any of Arcadia's profits can be traced directly to ill-gotten funds. FN16

> FN16. We do not intend to suggest that the plaintiff class ultimately will be able to establish the existence of a vested interest in any profits Arcadia may have received as a result of collecting money pursuant to an unlawful business practice. Rather, we merely recognize that in the context of this discovery dispute, it is not clear that the plaintiffs will *not* be able to establish that the disgorgement of certain profits made as a result of its unlawful practice falls under the rubric of "restitutionary disgorgement."

***918** IV.

DISPOSITION

The trial court's grant of summary judgment as to the class claims against Arcadia is reversed. We also reverse that portion of the trial court's order denying the plaintiffs' motion to compel discovery responses to the interrogatories regarding whether Arcadia maintained the allegedly ill-gotten funds in a separate account and, if so, whether those funds earned profits, or, if not, the rate of return on the commingled funds. The matter is remanded to the trial court for further proceedings. Costs are awarded to appellants.

WE CONCUR: BENKE, Acting P.J., and McINTYRE, J.

Cal.App. 4 Dist.,2007.
Juarez v. Arcadia Financial, Ltd.
152 Cal.App.4th 889, 61 Cal.Rptr.3d 382, 07 Cal. Daily Op. Serv. 7518, 2007 Daily Journal D.A.R. 9829

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Litigation
Financial Services
July 24, 2007

Client Alert

Lender Liability: California Appellate Decision Likely to Spur Class Actions Against Institutions That Finance Motor Vehicle Purchases

by Greg L. Johnson and Amy L. Pierce

In a significant decision, California's Fourth District Appellate Court interpreted the Rees-Levering Motor Vehicle Sales and Finance Act to require lenders to inform consumers whose cars are repossessed of the specific steps they must take, including how much they have to pay, to reinstate their conditional motor vehicle sales contracts.

Under *Juarez v. Arcadia Financial, Ltd.*, 61 Cal. Rptr. 3d 382 (June 26, 2007), lenders must include enough specific information in their Notice of Intent to dispose of a repossessed motor vehicle ("NOI") to allow defaulting buyers to determine "precisely what they must do in order to reinstate" their sales contracts.

The Rees-Levering Act (Cal. Civ. Code §§ 2981, *et seq.*) requires lenders to provide defaulting buyers who are party to a conditional vehicle sales contract with a written NOI in order for the person(s) liable on the contract to be liable for any deficiency after disposition of the repossessed motor vehicle. Among other statutorily required information, section 2983.2(a)(2) requires the NOI to state either that (1) there is a conditional right to "reinstate" the contract until the expiration of 15 days from the date of giving or mailing the notice and "all the conditions precedent thereto," or (2) there is no right of reinstatement, and the reasons therefore.

The *Juarez* Decision

The *Juarez* decision turned on whether the statutory clause requiring notice of "all the conditions precedent thereto" requires lenders to include in the NOI the specific dollar amount the defaulting buyer is required to pay to reinstate the contract, not just the amount necessary to redeem the motor vehicle. Although Arcadia's NOI contained both the statutorily required redemption and reinstatement sections, and notwithstanding that

Arcadia's NOI provided the specific dollar amount required to redeem the motor vehicle, the court focused on the information provided in the reinstatement provision in the NOI.

Like many lenders' NOIs, Arcadia's NOI did not specifically state the dollar amount required for reinstatement of the contract because typically when NOIs are issued the full amount owing is not known and/or will change over the course of time. Instead, Arcadia's NOI provided: "You may reinstate the contract within 20 days of the date of this notice under the following conditions: [¶] Payment of all past due installments, late payment penalties, repossession costs, resale expenses and storage fees (if any), and payment of repossession fee to local law enforcement agency."

The court held that the NOI was insufficient because "Arcadia's recitation of the general conditions for reinstatement does not adequately or reasonably apprise the consumer of 'all the conditions precedent' to reinstatement," as required by Section 2983.2(a)(2). The court further held that NOIs must provide sufficient information such that the defaulting buyers can "determine precisely what they must do in order to reinstate their contracts," including all of the following information:

- Amounts due to the lender and/or to a third party,
- To whom the amounts are due,
- Addresses and/or contact information for those parties,
- If, when, and by how much those amounts may increase as a result of additional payments coming due, or as a result of late fees or other fees and charges, and
- Any other specific actions the buyer must take.

The court further explained that "[t]he creditor must provide the consumer with *all* of the relevant information it possesses and/or information it has the ability to discern, concerning precisely what the buyer must do to reinstate his or her contract."

The court determined that Arcadia's NOI defeated the purpose of the Rees-Levering Act by putting the burden "on the consumer to gather sufficient, accurate information as to how he or she can fulfill the conditions of reinstatement." It reasoned that "an unscrupulous creditor could take advantage of this situation by simply evading a consumer's requests for the necessary information." Ultimately, the court concluded that Arcadia's use of a NOI with a "recitation of the general conditions for reinstatement" was unreasonable because "a creditor would *never* be required to inform the consumer of the amounts he or she must pay in order to reinstate the contract, *even if* the consumer called or wrote to inquire about this information."

Practical Arguments Rejected by the *JUAREZ* Court

Arcadia argued that there are many instances in which a lender will not know the necessary dollar amount required for reinstatement. The court countered that a lender is required to provide to a defaulting buyer the dollar amount due to either the lender or a third party when the lender knows, or reasonably should know, the amount due. Not only must the lender provide all relevant information it possesses, it must also provide "information it has the ability to discern" concerning precisely what the buyer must do to reinstate his or her contract.

Arcadia next argued that "[d]isclosure of various different reinstatement amounts due at different times might prove confusing to the buyer and burdensome to the creditor" and that lenders would be further burdened because "requiring 'new additional disclosures' will make compliance immeasurably more difficult for creditors." The court countered that Arcadia's general statements were more likely to confuse a defaulting buyer than would a detailed explanation and that "[t]he disclosures that we conclude must be included in the NOI are neither 'new' nor 'additional.' Rather, this is information that must be disclosed to the buyer at some point in time." The court concluded that "there is no reason to believe a consumer is likely to be confused by a notice that informs the consumer that if he or she wishes to reinstate the contract, he or she must pay a certain sum by a certain date, and that if the payment is not made by that date, he or she will have to pay additional sums." The court saw little practical difference in requiring Arcadia to provide specific information in the NOI or at a later time over the phone.

Plaintiffs' Claim Under the Unfair Competition Law

The Juarezes asserted that Arcadia's violation of the Rees-Levering Act also constituted a violation of the Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200, *et seq.* The trial court, finding that Arcadia's NOI did not violate the Rees-Levering Act, granted Arcadia's motion for summary judgment on the class UCL claims. The appellate court, after concluding that Arcadia's NOI was insufficient under the Rees-Levering Act, reversed the trial court's grant of Arcadia's summary judgment on the class UCL claims. Lenders will have to await the trial court's decision in order to reach a better understanding of the full impact of the *Juarez* decision on defaulting buyers' potential class UCL claims.

Practical Consequences of *JUAREZ* for Lenders

The *Juarez* appellate court remanded the case to the trial court for further proceedings. Once litigation concludes at the trial level, lenders will have a better understanding of the full impact the *Juarez* decision will have on the industry. However, based on the appellate court opinion, for the many lenders who distribute NOIs that provide only "a recitation of the general conditions for reinstatement," we expect to see an increase in consumer class action lawsuits targeted at the sufficiency of NOIs. For those NOIs determined to be invalid, deficiency balances will be deemed uncollectible and those who attempt to collect those deficiency balances likely will be subject to liability under Business & Professions Code sections 17200, *et seq.*

Many lenders have ceased the sale of repossessed vehicles until governing NOIs are revised. A practical response going forward will be for lending institutions to create due diligence checklists for the development of their NOIs.

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Enacted and Pending California legislation of interest to bankers, as of August 7, 2007

Enacted Legislation

SB 1037 (Committee on Banking….). **Chapter 99, Laws 2007.** *CBA: Neutral as amended*

Amends Financial Code 350, 697, 708, 1450, 1501.2, 1521, and 1522 and adds Fin.C. 691.1 on corporate securities activities of banks, and exempting certain trust businesses from meeting certain requirements.

Pending Bills

AB 7 (Lieu, Saldana), as amended in Senate June 28, 2007. *Passed Assembly* (74-0), April 26, 2007. With Senate Appropriations. To third reading, July 28, 2007. *CBA: Neutral*

Would add Financial Code 1241, 14960, 22345 and 23038 and amend Military & Veterans Code 394 to make it unlawful – as of passage and signing by the Governor – under the California Finance Lenders law and the California Deferred Deposit Transaction Law to violate certain provisions of the John Warner National Defense Deposit Authorization Act for Fiscal Year 2007 (on payday loans to armed forces personnel). Would also exempt from the California law prohibitions against discrimination in lending against armed forces personnel, any person who does not market or extend consumer loans to armed services members and any person who does not market deferred deposit transactions to, or enter into such transactions with, armed services members. Bill would not apply to banks.

AB 14 (Laird), as amended in Senate, July 3, 2007. *Passed Assembly* (46-29), May 21, 2007. With Senate Appropriations, after do-pass (3-2) by Senate Judiciary, June 27, 2007. To third reading, July 11, 2007. *CBA: Neutral if amended*

Civil Rights Act of 2007. Would, among many other things, amend the Song-Beverly Credit Card Act of 1971 to conform it to the Unruh Civil Rights Act, thereby adding disability, medical condition, marital status, and sexual orientation to the bases of prohibited credit card discrimination.

AB 18 (Blakesleee), as amended in Senate July 18, 2007. *Passed Assembly* (79-0), June 4, 2007. With Senate Appropriations. Hearing scheduled August 20, 2007. *CBA: Neutral as amended*

Warren Mattingly Signature Stamp Act.

Would only amend Elections Code 354.5 in other codes, on signature stamps made by persons who because of physical disabilities cannot write. Since amendment would only apply for Election Code purposes, this bill will not be included in future listings.

AB 70 (Jones), as amended in Senate July 17, 2007. *Passed Assembly*, June 6, 2007. With Senate Judiciary. To third reading, July 17, 2007. *CBA: No position*

Would add Water Code 8460 et al to provide that a city or county may be required to contribute its fair and reasonable share of the property damage caused by a flood, to the extent that the city or county increased the state's exposure by unreasonably approving new development in a previously undeveloped area, if the city or county failed to comply with existing law.

Other pending bills on water or flood control or disaster relief include:

AB 5 (Wolk), as amended in Senate, June 21, 2007. *Passed Assembly* (45-32), June 7, 2007. With Senate Appropriations, after do pass (3-2) from Senate Judiciary, July 11, 2007

AB 62 (Nava), as amended in Senate, July 20, 2007. *Passed Assembly* (74-0), May 17, 2007. With Senate Appropriations. Hearing scheduled August 20, 2007

AB 156 (Laird), as amended June 1, 2007. *Passed Assembly* (78-1), June 5, 2007. With Senate Appropriations, after do-pass (7-0) from Senate Natural Resources & Water, July 11, 2007. Hearing scheduled August 20, 2007. *CBA: Support priority 3*

SB 05 (Machado), as amended April 25, 2007. *Passed Senate* (27-9), June 6, 2007. With Assembly Appropriations after do-pass by Assembly L.Gov. (5-1), July 3, 2007**.** *CBA: Support priority 3*

SB 17 (Florez), as amended June 4, 2006. *Passed Senate* (25-11), June 7, 2007. With Assembly Appropriations after do-pass (7-5) by Assembly Water, Parks & Wildlife, July 5, 2007

SB 34 (Torlakson), as amended April 17, 2007. *Passed Senate* (21-16), May 21, 2007. With Assembly Appropriations after do-pass (7-5) by Assembly Water, Parks, & Wildlife, June 26, 2007. To third reading, July 16, 2007

AB 150 (Lieu), as amended July 17, 2007. *Passed Assembly* (71-8), June 5, 2007. With Senate Appropriations. Hearing scheduled August 20, 2007. *CBA: Support priority 3*

Would add Education Code 52980 et seq., the California Financial Literacy Initiative.

AB 512 (Lieber, Coto), as amended in Senate, July 5, 2007. *Passed Assembly* (47-29), June 7, 2007. With Senate Appropriations. Hearing scheduled August 20, 2007. *CBA: Oppose*

Would amend Civil Code 1632 to extend California's "foreign language translation" statute to residential mortgages. Lenders would be required to provide a translation of the summary sheet of loan terms in the language in which the loan was negotiated, if that was either Spanish, Tagalog, Mandarin Chinese, Vietnamese, or Korean. A bank, etc., that makes loans secured by real property shall provide a summary translation of specified contract terms in each of those languages, as drafted by the Secretary of the Business, Transportation and Housing Agency.

AB 779 (Jones), as amended in Senate July 10, 2007. *Passed Assembly* (58-2), June 6, 2007.

With Senate Appropriations. Hearing scheduled August 20, 2007. *CBA: Oppose priority 2*

Would add Civil Code 1724.4 and 1724.5 and amend Civil Code 1798.29 and 1798.82 to, among other things, make any retailer that violates the no-storage provisions of network rules liable to any card issuer harmed thereby.

AB 1168 (Jones), as amended in Senate August 1, 2007. *Passed Assembly* (75-0), June 6, 2007. With Senate Appropriations. Hearing scheduled August 20, 2007. *CBA: Oppose priority 2 unless amended*

Would add Civil Code 1798.88 and 1798.89 and various other codes to, among other things, require that certain agencies redact social security numbers from certain records before publicly displaying such records. Also, no one could record or file with a local public agency any document that displays more than the last four digits of a social security number, unless required by state or federal law.

SB 11 (Migden), as amended in Assembly, July 5, 2007. *Passed Senate* (23-15), June 4, 2007. To Assembly Appropriations suspense file, July 18, 2007

Would amend Family Code 297 and 298.5 and Probate Code 2854 to eliminate the requirement that domestic partnerships be same sex.

SB 30 (Simitian), as amended in Assembly, June 12, 2007. *Passed Senate* (33-3), May 24, 2007. To Assembly Appropriations suspense file, July 11, 2007. *CBA: Oppose priority 3.*

Identity Identification Protection Act of 2007

SB 48 (Perata), as amended in Assembly, July 12, 2007. *Passed Senate* (23-16), June 7, 2007. With Assembly Appropriations.

As introduced and as passed Senate, dealt with health care coverage. As now amended, deals with healthy food choices. Will not be included in future listings.

SB 385 (Machado), as amended in Assembly June 21, 2007. *Passed Senate* (34-1), June 6, 2007. To Assembly Appropriations suspense file, July 18, 2007. *CBA: Support priority 2*

Would amend Business Professions Code 101.31.1 and 10245 and add B&PC 10240.3, Financial Code 215.5, 22171, and 50333, and Government Code 13984 to require state-licensed mortgage lenders and brokers, banks, and credit unions to comply with the (federal) Interagency Guidance on Nontraditional Mortgage Product Risks and with the guidance on nontraditional mortgage products issued by the Conference of State Bank Supervisors and the American Associat0ion of Residential Mortgage Regulators. Willful violations by real estate brokers or residential mortgage lenders would be a crime.

Bill would also expand the definition of real estate broker to include a person who engages as a principal in the business of making loans, with "in the business" defined as the making of eight or more specified loans to the public from the person's own funds.

SB 388 (Corbett), as amended in Assembly July 3, 2007. *Passed Senate* (22-17), May 31, 2007. With Assembly Judiciary. To third reading, July 5, 2007. *CBA: Oppose priority 2*

Would add Civil Code 60 et seq. on radio frequency identification (RFID) tags. Any private entity that sells or issues a card with an RFID tag that is capable of being scanned for the cardholder's personally identifiable information must give certain information to the recipient. A recipient cardholder who is not so informed can sue any private entity that intentionally violates the law for $1,000 or actual damages. Attorneys fees and costs to the prevailing party.

Bills that are likely dead, at least for this year

AB 26 (Nakanishi), as amended May 2, 2007. With Assembly Appropriations. Held under submission, May 31, 2007

Flood control

AB 36 (Niello), as introduced December 4, 2006. To Assembly Public Employees, Retirement & Social Security. *CBA: Neutral*

Would add Education Code 221010 and Government Code 20085 et seq. and 31455.5 to criminalize the making of false material statements re public employee retiree benefits or applications, or to knowingly accept public employee retiree benefits while knowing he/she is not entitled thereto. Jail, fines, and restitution.

AB 41 (La Malfa), as amended April 9, 2007. With Assembly Natural Resources.

Water resources: bond proceeds

AB 71 (Dymally), as amended April 9, 2006. With Assembly Revenue & Taxation. Hearing for testimony only, May 21, 2007.

As introduced, would have indexed the minimum wage to inflation. As amended, would allow a tax credit to small employers of a part of any amount paid for health insurance. Will not be included in future listings.

AB 75 (Blakeslee), as introduced December 4, 2006.

Spot bill on health care coverage for all working Californians and their families.

AB 78 (Torrico), as amended April 10, 2007. With Assembly Appropriations. Held under submission, May 31, 2007. *CBA: Neutral as amended*

Would amend and add various provisions of the Government Code to require that any committee regulated by the Political Reform Act of 1970 establish an account to include all contributions to a candidate, etc., with interest paid to the State Treasury, to be used by the Fair Political Practices Commission to enforce the Political Reform Act. A candidate-controlled committee could opt out of this requirement by paying the FPPC $ 5,000.

AB 245 (DeVore), as introduced February 1, 2007. With Assembly Revenue & Taxation. Held under submission, May 28, 2007. . *CBA: Neutral*

Would add and amend various provisions to the Revenue and Taxation Code to allow deductions for health savings account in conformity with federal law.

AB 267 (Calderon), as amended March 29, 2007. With Assembly Insurance. Hearing scheduled April 11, 2007, cancelled at request of author. *CBA: Support priority 3*

Would add Insurance Code 784.50 et seq. to require any insurance producer agent or insurer who pitches an annuity to a senior (age 65 or older) consumer to have reasonable grounds for believing that the annuity is suitable for that consumer.

AB 703 (Ruskin), as introduced February 22, 2007. With Assembly Judiciary. Hearing scheduled April 17, 2007, cancelled at request of author. *CBA: Neutral as amended*

Would add Civil Code 1798.555 to prohibit using a social security number as an identifier except when required by federal law. Any records with such numbers must be either encrypted or stored under lock and key, and when destroyed, done so through cross-cut shredding or some other manner that protects confidentiality.

AB 1301 (Gaines), as introduced February 23, 2007. With Assembly Banking & Finance. Hearing cancelled at request of author, April 24, 2007

Would repeal Financial Code 753 and amend Fin.C. 3516, to require Commissioner approval before any bank could deposit any of its funds with another corporation.

AB 1313 (Calderon), as amended April 24, 2007. With Assembly Judiciary. Hearing scheduled May 8, 2007, cancelled at request of author. *CBA: Support priority 3*

Would amend Civil Code 1747.85 to allow a card issuer to terminate all or substantially all of a class of the issuer's private label credit card accounts on 60 days after-the-fact notice, instead of 30 days prior notice.

AB 1418 (Arambula), as amended April 24, 2007. With Assembly Banking & Finance. *CBA: Support*

Would add Financial Code 14835 to require the Credit Union Advisory Committee (part of the Department of Financial Institutions) to develop a Credit Union Membership Investment Model that would identify credit union best practices in the areas of community development, small business and microenterprise financing, and investments of credit union capital. The model would have to be developed by July 1, 2009 and would be posted on the DFI's website.

SB 06 (Oropeza), as amended April 11, 2007. With Senate Local Government. Hearing postponed by committee, April 24, 2007

Land use planning; flood control

SB 31 (Simitian), as amended April 17, 2007. Held in committee without recommendation, April 24, 2007. To Assembly. *CBA: Neutral*

Would add Civil Code 1798.79 et al to make it a misdemeanor to remotely read (or attempt to remotely read) a person's ID.

SB 59 (Cogdill), as introduced January 11, 2007. With Senate Natural Resources. Failed passage in committee (3-4), April 24, 2007, reconsideration granted

Reliable Water Supply Bond Act of 2008

SB 129 (Kuehl), as amended March 15, 2007. With Senate Public Safety. Held in committee without recommendation, March 27, 2007. *CBA: Oppose priority 3 unless amended*

Would amend Penal Code 653m to increase the penalties for intentionally annoying telephone calls, etc., if the call is in violation of a protective order, if the caller and callee have a specified relationship, or if a person knowingly permits a telephone, etc., under the person's control to be used for a prohibited purpose.

SB 270 (McClintock), as introduced February 15, 2007. With Senate Judiciary. *CBA: Support priority 3*

Would amend Code of Civil Procedure 1513 through 1521 on unclaimed property. Among other things, abandoned property held by a bank would escheat after 7 years instead of 3 years. Also, banks would have to send notices to apparent owners of safe deposit boxes concerning escheat.

SB 294 (Ackerman), as introduced February 15, 2007. With Senate Judiciary. Hearing scheduled March 27, 2007, cancelled at request of author.

Would amend Corporations Code 1502, 1502.1, 2117, and 2117.1 to excuse a publicly traded corporation from having to file certain reports with the Secretary of State if the corporation has a central index key that enables anyone to obtain information about that corporation from the SEC.

SB 461 (Ashburn), as introduced February 21, 2007. To Senate Public Employment and Retirement. Failed passage in committee (1-2), April 16, 2007. Reconsideration granted. *CBA: Neutral if amended*

Would add Government Code 7513.4 and 16642.5 to prohibit the Public Employees' Retirement System and the California State Teachers' Retirement System from investing public employment retirement finds in any company with business operations in a foreign terrorist state.

SB 573 (Scott), as amended in Assembly July 2, 2007. *Passed Senate* (36-2), May 21, 2007. With Assembly Insurance. Ordered that bill be retained in committee, and subject matter be referred to Committee on Rules for assignment to the proper committee for study, July 5, 2007.

Would require any life insurance agent or insurer that pitches as annuity to a senior consumer have reasonable grounds for believing that the annuity is suitable for that consumer.

SB 596 (Harman), as introduced February 22, 2007. To Senate Judiciary. First hearing cancelled at request of author. *CBA: Oppose priority 2*

Would add Business & Professions Code 22949 et seq. to require that any computerized payment system sold as new in California to include antisniffer protection. A sniffer is a program or device that monitors data traveling over a computer network.

SB 638 (Romero), as introduced February 22, 2007. With Senate Banking, Finance & Insurance. Hearing scheduled May 7, 2007, cancelled at request of author.. *CBA: Oppose priority 1 unless amended*

Would amend Financial Code 14800 to allow state-chartered credit unions to offer lifeline banking (i.e., to sell money orders and to cash checks and money orders and receive electronic finds transfers) for persons not in their field of membership.

SB 752 (Steinberg), as amended April 18, 2007. With Senate Revenue & Taxation. Hearing cancelled at request of author, April 19, 2007. *CBA: No position*

Would add Government Code 99100 and Revenue & Taxation Code 17140.1, the California Kids Investment and Development Savings (KIDS) Account Ac. Every child born in California on and after January 1, 2008, would get a $ 500 investment account with the State Treasury.

Bob Mulford, August 7, 2007

Attachment 9

06-0409-cv
Cohen v. JP Morgan Chase & Co.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: September 27, 2006 Decided: August 6, 2007)

Docket No. 06-0409-cv

SYLVIA C. COHEN, on behalf of herself
and all other persons similarly situated

Plaintiff-Appellant,

—v.—

JP MORGAN CHASE & CO. and JP MORGAN CHASE BANK,

Defendants-Appellees.

Before:

WALKER, KATZMANN, and RAGGI, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*), dismissing complaint that an undivided unearned fee charged in connection with the refinancing of a home mortgage violated Section 8(b) of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(b), and New York General Business Law § 349. VACATED and REMANDED.

CATHERINE E. ANDERSON, Giskan & Solotaroff, New York, New York, *for Plaintiff-Appellant.*

GARY C. TEPPER, Arent Fox PLLC, Washington, D.C., *for Defendants-Appellees.*

CHRISTINE N. KOHL, Civil Division, United States Department of Justice, Washington, D.C., *for Amicus Curiae the United States Department of Housing and Urban Development in support of Plaintiff-Appellant.*

REENA RAGGI, *Circuit Judge*:

Plaintiff Sylvia C. Cohen sued defendants JP Morgan Chase & Co. and JP Morgan Chase Bank (hereinafter referred to collectively as "Chase") in the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*), alleging that Chase's collection of an unearned "post-closing fee" in connection with its refinancing of her home mortgage violated Section 8(b) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(b), and New York General Business Law § 349. In a judgment entered on March 16, 2005, Cohen v. J.P. Morgan Chase & Co., No. CV-04-4098(CPS) (E.D.N.Y. Mar. 16, 2005), the district court dismissed Cohen's complaint on the ground that it failed to state a claim under RESPA § 8(b) because (1) the fee at issue was analogous to an "overcharge," which Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 55-57 (2d Cir. 2004), held was not prohibited by § 8(b); and (2) plaintiff had, in any event, failed to plead that the challenged fee represented part of a charge split between Chase

and one or more third parties. The district court similarly concluded that Cohen failed to state a deceptive practices claim under state law because the pleaded facts demonstrated that the challenged fee was disclosed.

For the reasons stated herein, we conclude that Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 55-57, does not control this case. We further conclude that RESPA § 8(b) is ambiguous as to whether its protections can apply to undivided, as well as divided, unearned fees. Because the Department of Housing and Urban Development ("HUD"), the agency charged with administering RESPA, reasonably resolves this ambiguity by construing the statute to apply to undivided fees, we accord that construction deference pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and we vacate the dismissal of Cohen's federal claim. We similarly vacate the dismissal of Cohen's state claim because, if she can show that the challenged fee violated RESPA, that fact might allow her to establish a deceptive business practice under New York law. Accordingly, we remand this case to the district court for reinstatement of the complaint and further proceedings consistent with this opinion.

I. Factual Background

In September 2003, when Sylvia Cohen refinanced her home mortgage, Chase presented her with a closing statement listing various fees incurred in connection with that transaction. Among these was a $225 "post-closing fee," which Cohen paid. Cohen alleges that Chase provided no services for this fee. Although Chase disputes this contention, on

review of a judgment of dismissal, we must assume its truth. See, e.g., McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).

On September 22, 2004, Cohen instituted this action, suing on behalf of herself and a putative class of persons who had also refinanced home mortgages with Chase and paid similar unearned fees. See Fed. R. Civ. P. 23.[1] Following the district court's grant of Chase's motion to dismiss and its denial of Cohen's motion for reconsideration, see Cohen v. J.P. Morgan Chase & Co., No. CV-04-4098(CPS), 2006 WL 20596 (E.D.N.Y. Jan. 4, 2006), Cohen filed this appeal.

II. Discussion

A. Cohen's RESPA Claim

1. RESPA § 8(b) and the Standard of Review

Cohen's federal claim against Chase is premised on RESPA § 8(b), which states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). In a formal policy statement, HUD has construed this statutory section to proscribe unearned fees in three contexts:

> [where] (1) [t]wo or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of services performed or goods provided by another settlement service

[1]Because the district court dismissed Cohen's complaint for failure to state a claim, it had no occasion to consider the propriety of her proceeding on behalf of a class.

> provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,059 (Oct. 18, 2001) (codified at 24 C.F.R. § 3500.14(c)) ("Policy Statement") (emphasis added). The third numbered provision in fact references two circumstances. Cohen relies on the first, highlighted circumstance in pursuing her claim that "one service provider," such as Chase, cannot charge a consumer a fee for which "no . . . work is done," what we refer to hereinafter as an "undivided unearned fee."[2] The second, unhighlighted circumstance prohibits charges over and above "reasonable value." We invalidated this part of the third provision in Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 57, discussed infra at **[6-8]**.

We review the district court's decision to dismiss Cohen's § 8(b) claim de novo, both because it is a ruling of law pursuant to Federal Rule of Civil Procedure 12(b)(6), see McCarthy v. Dun & Bradstreet Corp., 482 F.3d at 191, and because it depends on statutory construction, see Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 54. Further, "the question of the appropriate level of deference to accord agency regulations is one purely of law, subject to de novo review." Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 122 (2d Cir. 2004), vacated on other grounds, 546 U.S. 1147 (2006).

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[2]The Policy Statement's first numbered provision proscribes unearned fees that make up any portion of a fee split between two or more persons, what we refer to hereinafter as a "divided unearned fee."

2. *Kruse* Does Not Control This Case

Because the district court ruled that Cohen's claim was precluded as a matter of law by our construction of RESPA § 8(b) in Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 57, we consider at the outset whether that decision does, in fact, control this case. We conclude that it does not.

In Kruse, we considered two parts of the quoted Policy Statement: numbered provision 2, referencing mark-ups; and the second part of numbered provision 3, referencing fees in excess of reasonable value. The Kruse plaintiffs alleged that Wells Fargo had violated § 8(b) by marking up the price of services provided by a third party. We concluded that RESPA § 8(b) was "not clear and unambiguous with respect to its coverage of mark-ups." Id. at 58.[3] Because the second prong of HUD's Policy Statement reasonably resolved that ambiguity to prohibit mark-ups, we accorded Chevron deference to that agency interpretation. See id. at 58, 61. The Kruse plaintiffs further alleged that defendants violated § 8(b) by charging fees in excess of the reasonable value of services that they did provide. We held that this agency interpretation, which effectively imposed price controls on

[3]In so ruling, we rejected the views of three sister circuits that § 8(b)'s phrase, "[n]o person shall give and no person shall accept" requires both a culpable giver and acceptor of the challenged fee for there to be a violation of law. See Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 57-58 (rejecting views of Fourth, Seventh, and Eighth Circuits in Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 265 (4th Cir. 2002), Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002), and Haug v. Bank of America, N.A., 317 F.3d 832, 838 (8th Cir. 2003), in favor of those expressed by Eleventh Circuit in Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979, 983 (11th Cir. 2003)).

settlement fees, was contrary to the plain meaning of the statute. See id. at 56. We explained that RESPA § 8(b) does not authorize courts to break down a single charge into "reasonable" and "unreasonable" components. Id. ("Whatever its size, such a fee is 'for' the services rendered by the institution and received by the borrower."). Thus, we invalidated that part of the Policy Statement's third prong prohibiting fees exceeding the "reasonable value" of the services rendered. Id.

On this appeal, Cohen relies on neither of the Policy Statement provisions at issue in Kruse to support her § 8(b) claim. Instead, she invokes only that part of the third numbered provision wherein HUD interprets § 8(b) to prohibit undivided unearned fees charged by a single service provider. Each party to this action nevertheless contends that Kruse compels resolution of this appeal in its favor. Cohen (with the support of HUD) argues that the twin rulings in Kruse effectively establish that, while § 8(b) does not authorize price controls for services actually performed, it does proscribe fees for no services, whether structured as a divided or undivided charge. Chase counters that Kruse approved the application of § 8(b) to mark-ups only because a mark-up, by allowing one person to piggy-back an unearned fee onto the charge of a third-party service provider, effectively constitutes a divided charge. For its part, the district court concluded that Cohen's claim failed because the challenged fee was sufficiently analogous to the overcharges that Kruse held were beyond the reach of the statute.

In fact, Kruse had no occasion to consider and, therefore, did not address the critical

issue on this appeal: whether RESPA § 8(b)'s reference to "any portion, split, or percentage of any charge" clearly and unambiguously indicates Congress's intent to prohibit unearned fees only when incorporated in charges divided among two or more persons, thereby precluding HUD's construction of the statute to prohibit "one service provider" from "charg[ing] the consumer a fee where no, nominal, or duplicative work is done," Policy Statement, 66 Fed. Reg. at 52,052. In this quoted language, HUD's focus is not on lenders who overcharge for services actually provided; it is on lenders who charge fees for no services at all. Accordingly, Kruse's holding that RESPA § 8(b) is clearly not a price control statute does not resolve this appeal. Similarly, the quoted Policy Statement language here is distinct from the provision concerned with mark-ups. Thus, Kruse's holding that RESPA § 8(b) is ambiguous with regard to mark-ups, and that the second prong of the Policy Statement reasonably resolves this ambiguity by establishing their illegality, tells us nothing about whether § 8(b) also prohibits undivided unearned fees. To resolve that issue, we must again interpret § 8(b) according to the two-step process outlined in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 842-43, this time focusing on RESPA's reference to "any portion, split, or percentage of any charge."

3. *Chevron* Analysis Supports HUD's Construction of RESPA § 8(b) to Prohibit Lenders from Accepting Undivided Unearned Fees

a. *Chevron* Analysis

At Chevron step one, we consider whether Congress has clearly spoken in RESPA § 8(b) to the issue of undivided unearned fees. "If the intent of Congress is clear, that is the

end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id.; accord Chauffeur's Training Sch., Inc. v. Spellings, 478 F.3d 117, 125 (2d Cir. 2007). To ascertain Congress's intent, we begin with the statutory text because if its language is unambiguous, no further inquiry is necessary. See Zuni Pub. Sch. Dist. v. Dep't of Educ., 127 S.Ct. 1534, 1543 (2007); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 423 (2d Cir. 2005). If the statutory language is ambiguous, however, we will "resort first to canons of statutory construction, and, if the [statutory] meaning remains ambiguous, to legislative history," Daniel v. Am. Bd. of Emergency Med., 428 F.3d at 423 (internal citations omitted), to see if these "interpretive clues" permit us to identify Congress's clear intent, General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 586 (2004). If we still cannot conclude that Congress has "directly addressed the precise question at issue," we will proceed to Chevron step two, which instructs us to defer to an agency's interpretation of the statute, so long as it is "reasonable." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 843-44; accord Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 55.

b. The Statutory Phrase "Any Portion, Split, or Percentage of Any Charge" Is Ambiguous with Respect to Congress's Intent to Prohibit Undivided Unearned Fees

Accepting as true the allegations in Cohen's complaint, we assume that the challenged $225 post-closing fee could constitute a "charge" for which no "services [were] actually performed" under RESPA § 8(b), i.e., an unearned fee. 12 U.S.C. § 2607(b). Accordingly,

at the first step of Chevron analysis, we must decide whether § 8(b)'s reference to "any portion, split, or percentage of" an unearned charge demonstrates Congress's clear intent to prohibit unearned fees only when reflected in charges divided among two or more persons. Chase submits that such intent is apparent from the plain meaning of the words "portion," "split," and "percentage." To support Cohen's claim, HUD counters that § 8(b)'s reference to "any portion, split, or percentage of any charge" signals Congress's broader intent. Because the text is, in fact, subject to "divergent, but plausible, constructions," on the issue of undivided unearned fees, Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 58, we conclude that it is ambiguous in revealing Congress's intent on this subject.

To explain, we begin by considering the "ordinary meaning" of the nouns at the center of the contested phrase. Gonzales v. Carhart, 127 S.Ct. 1610, 1630 (2007); accord Tafari v. Hues, 473 F.3d 440, 442 (2d Cir. 2007). The word "portion" is commonly understood to mean "an individual's part or share of something" or "a part of a whole." Webster's Third New International Dictionary 1768 (2002). "Split" means "a product of division by or as if by splitting," or "a share (as of booty, winnings, profits)." Id. at 2202. "Percentage" is commonly understood to mean "a part of a whole expressed in hundredths." Id. at 1675. To the extent the words "share" and "part" recur in these definitions, we note that "share" is commonly defined as "a portion belonging . . . to an individual," id. at 2087, while "part" is defined as "one of the equal or unequal portions into which something is or is regarded as divided" or "something less than a whole," id. at 1645. Thus, because the words "portion,"

"split," and "percentage" are commonly understood to reference things that have been divided and that are less than a whole, their use together in RESPA § 8(b) could plausibly be understood to signal a legislative intent to prohibit unearned fees only when reflected in divided charges.

Our task at Chevron step one, however, is not simply to interpret individual words but to construe statutes. In so doing, we follow "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it." General Dynamics Land Sys., Inc. v. Cline, 540 U.S. at 596 (internal quotation marks omitted). In RESPA § 8(b), Congress placed the words "portion, split, or percentage" within the phrase "any portion, split, or percentage of any charge." 12 U.S.C. § 2607(b) (emphasis added). As the Supreme Court has frequently observed, use of the word "any" in statutory text generally indicates Congress's intent to sweep broadly to reach all varieties of the item referenced. See, e.g., United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976) in concluding that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'"); accord HUD v. Rucker, 535 U.S. 125, 131 (2002) (same); Ruggiero v. County of Orange, 467 F.3d 170, 175 (2d Cir. 2006) (noting that "Congress made [the phrase at issue] even broader when it chose the expansive word 'any' to precede the list" (internal quotation marks omitted)). The Court most recently applied this principle in interpreting the phrase "'any air pollution agent or combination of such agents, including any physical, chemical . . .

substance or matter which is emitted into or otherwise enters the ambient air'" in the Clean Air Act. Massachusetts v. EPA, 127 S. Ct. 1438, 1460 (2007) (quoting 42 U.S.C. § 7602(g)) (ellipsis and emphases in original). It concluded that "[o]n its face," the quoted language "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'" Id.

The Court has cautioned that, in some circumstances, the word "any" may warrant a narrower interpretation. See, e.g., Small v. United States, 544 U.S. 385, 388 (2005) ("[E]ven though the word 'any' demands a broad interpretation, we must look beyond that word itself." (internal quotation marks omitted)); Nixon v. Missouri Mun. League, 541 U.S. 125, 132 (2004) ("'[A]ny' can and does mean different things depending upon the setting."); Lewis v. United States, 523 U.S. 155, 160 (1998) (avoiding "literal reading of the words 'any enactment'" that "would dramatically separate the statute from its intended purpose"). This precedent only reinforces the rule that statutory terms are not interpreted in the abstract but in the context of surrounding language. Thus, we must consider whether the expansive modifier "any," when paired with the nouns "portion, split, or percentage," can plausibly be construed to include an undivided charge. We conclude that it can.

In reaching this conclusion, we note that, although Congress appears to have used the precise phrase "any portion, split, or percentage" only in RESPA § 8(b), it has used the formulations "any portion of" and "any percentage of" in other federal statutes.[4] For

[4]The parties do not point us to any use of the phrase "any split of" in the United States Code other than in RESPA § 8(b), and we have identified none ourselves.

example, 18 U.S.C. § 644 states: "Whoever, not being an authorized depository of public moneys, knowingly receives . . . any public money . . . or uses, transfers, converts, appropriates or applies any portion of the public money for any purpose not prescribed by law is guilty of embezzlement" (emphasis added). Similarly, 18 U.S.C. § 648 and § 653 proscribe as "embezzlement" the unauthorized use, conversion, transfer, or application of "any portion of the public money[s] intrusted to [certain persons]" (emphasis added). Title 19 U.S.C. § 1620 makes it unlawful for a federal official to accept or receive "any portion of the money which may accrue to any person making [a customs] detection and seizure" (emphasis added). In none of these statutes does Congress's use of the phrase "any portion of" manifest a clear intent not to criminalize the proscribed conduct when it involves the whole of the moneys at issue. Indeed, such a conclusion would appear to border on the absurd.[5] So too, the requirement that a financial institution not collect or attempt to collect from a student loan recipient "any portion of the interest on the note which is payable by the Secretary [of Education]," 20 U.S.C. § 1077(a)(2)(E) (emphasis added), hardly signals clear congressional intent to allow institutions to collect the whole of such interest.

As for the phrase "any percentage," in 42 U.S.C. § 1396a(l)(4)(B), authorizing medical assistance grants, Congress used it to allow certain states to "substitute for the percentage provided [earlier in the section] any percentage" (emphasis added). Because the

[5]Of course, this case presents us with no occasion to rule on the meaning of any statute except RESPA § 8(b). We reference other statutes merely to illustrate why we cannot confidently conclude from the text of § 8(b) that Congress clearly intended to prohibit unearned fees only when they were divided among two or more persons.

percentages provided by the statute include 75% and 133%, see id. § 1396(l)(2)(A)(ii), it appears clear that, in this context at least, Congress plainly intended "any percentage" to reference amounts equal to and even greater than 100%. See also Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 481 (2002) (referring to "percentage" in context of 42 U.S.C. § 1396r-5, including 150%); Garelick v. Sullivan, 987 F.2d 913, 915 (2d Cir. 1993) (discussing "percentages" of "charges" in context of 42 U.S.C. § 1395w-4(g)(2), including 115%).

Mindful that Congress has thus frequently used the phrases "any portion" and "any percentage" without conveying a clear intent to legislate only as to less than the whole, we cannot confidently conclude from their inclusion in RESPA § 8(b) that, in that context, they unambiguously convey a narrow congressional intent.[6] Nevertheless, we consider the

[6]Our conclusion is reinforced by the fact that Congress also routinely uses the phrase "any part of" in various federal statutes that do not clearly communicate an intent to reference only parts less than a whole. For example, the federal racketeering statute makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income . . . [in] interstate commerce." 18 U.S.C. § 1962(a) (emphasis added). A defendant who had invested all his racketeering-derived income in interstate commerce could not escape liability by arguing that Congress intended to reach only persons who invested less than the whole of their illicit profits. See generally Leonard B. Sand et al., Modern Federal Jury Instructions: Criminal, Instruction 52-8 cmt. (June 2000) (observing that statutory phrase "any part of the income" has been characterized as "expansive, not restrictive" and "deliberately broad" (internal quotation marks omitted)). The same conclusion obtains with respect to federal narcotics laws. See 21 U.S.C. § 854(a) (making it unlawful for any person who has derived income from violation of federal drug laws "to use or invest, directly or indirectly, any part of such income" in interstate commerce (emphasis added)). Similarly, Congress's prohibition of the use of force to induce any person employed on a federally funded construction project to "give up any part of the compensation to which he is entitled under his contract of employment," 18 U.S.C. § 874 (emphasis added), hardly signals a clear

possibility that the sum may be more than its parts and that the longer phrase here at issue — "any portion, split, or percentage of any charge" — might convey Congress's clear intent to exclude an undivided whole. Three of our sister circuits have, after all, embraced such a narrow interpretation of RESPA § 8(b). See Haug v. Bank of Am., N.A., 317 F.3d 832, 840 (8th Cir. 2003) (holding that "plain language of Section 8(b) requires plaintiffs to plead facts showing that the defendant illegally shared fees with a third party"); Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (reasoning that defendant "did not 'accept any portion, split, or percentage of any charge'" because no one agreed "to divide" a fee); Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 265 (4th Cir. 2002) ("By using the language 'portion, split, or percentage,' Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge."). But see Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979, 983 (11th Cir. 2003) (holding that "a single party can violate subsection 8(b)"). These circuits' holdings with respect to undivided unearned fees cannot, however, be divorced from their construction of § 8(b)'s phrase "[n]o person shall give and no person shall accept" to require at least two culpable parties in any proscribed transaction. This court rejected that construction in our consideration of "mark-ups" in Kruse v. Wells Fargo Home Mortgage Corp., 383 F.3d at 57-58. Thus, we do not assume that a guilty giver and a guilty acceptor must participate in every unlawful unearned charge, a circumstance more suggestive of a divided charge.

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intent not to criminalize extortion of the whole of the victim's compensation.

Nor does the canon of construction noscitur a sociis permit us to identify a clear congressional intent to limit § 8(b) to divided charges. See 2A Norman J. Singer, Statutes and Statutory Construction § 47.16 (6th ed. 2002) (explaining that "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the specific word"). As we have already recognized, the common meaning of all three nouns in the contested phrase references something that has been divided and is less than whole. See supra at **[10-11]**. Whether or not any one noun is more specific in this respect, the critical interpretive issue in this case is not whether distinctions can be drawn among these three nouns, but whether use of the expansive modifier "any" in conjunction with all three words gives rise to ambiguity regarding Congress's intent with respect to § 8(b)'s prohibition on undivided unearned fees.

We conclude that it does. Congress's serial reference to "any portion, split, or percentage of any charge" in § 8(b) can plausibly be construed to demonstrate a legislative intent to sweep broadly, prohibiting all unearned fees, however structured. See generally United States v. Dauray, 215 F.3d 257, 262 (2d Cir. 2000) (concluding that noscitur a sociis does not resolve textual ambiguity where language plausibly supports both narrow and expansive reading). While Congress could certainly have used clearer language to convey such intent, see, e.g., 11 U.S.C. § 1301(a) (barring creditors from collecting "all or any part of a consumer debt" of debtor protected by Chapter 13 bankruptcy (emphasis added)), it could also have used clearer language if its intent was to exclude undivided unearned fees

from the statute's reach. Faced with competing, plausible interpretations, we conclude that the statutory text is ambiguous in conveying Congress's intent. See Mizrahi v. Gonzales, No. 05-0010-ag, slip at 21-22 (2d Cir. June 27, 2007) (recognizing ambiguity arising from competing, plausible interpretations); Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 58 (observing that "divergent, but plausible, constructions" of language at issue preclude finding of "clear and unambiguous" congressional intent); see also United States v. Gayle, 342 F.3d 89, 92-93 (2d Cir. 2003) (concluding that phrase "any court" is ambiguous as to inclusion of foreign courts); Cheung v. United States, 213 F.3d 82, 90-91 (2d Cir. 2000) (observing that phrase "any foreign government" is ambiguous as to inclusion of Hong Kong where statutory terms "neither compel nor exclude" competing interpretations).

c. RESPA's Structure, Purpose, and History Do Not Clearly Resolve the Textual Ambiguity

When the text of a statute is ambiguous, we look to "structure, purpose, and history" to determine whether these construction devices can convincingly resolve the ambiguity at Chevron step one. General Dynamics Land Sys., Inc. v. Cline, 540 U.S. at 600. A high level of clarity is necessary to resolve textual ambiguity in this manner. At the first step of Chevron analysis, a court's task is not to infer what Congress might have said about the issue in dispute if it had considered the matter; a court decides only "whether Congress has directly spoken to [that] precise question." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 842. Thus, we employ traditional tools of construction to determine only if they compel a particular conclusion as to Congress's intent. See Pension Benefit Guar. Corp. v.

LTV Corp., 496 U.S. 633, 649 (1990); see also General Dynamics Land Sys., Inc. v. Cline, 540 U.S. at 586, 590 (observing that "interpretive clues" spoke "almost unanimously," establishing Congress's intent "beyond reasonable doubt"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143, 158 (2000) (concluding that Congress's preclusion of agency position was "inescapable" and "unmistakable"); cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 240 (1986) (observing that "scattered statements" in legislative history "hinting at" congressional intent are insufficient to resolve ambiguity). In this case, they do not.

(1) Structure

RESPA is structured so that Section 8, entitled "Prohibition against kickbacks and unearned fees," is divided into three subparts. Section 8(a), entitled "Business referrals,"[7] prohibits payments for referrals within the real estate settlement business. 12 U.S.C. § 2607(a). Section 8(b), entitled "Splitting charges," is the part at issue in this case. Id. § 2607(b). As already noted, it prohibits any person from giving or accepting not only any split charge for which no services were performed, but also any portion or percentage of an unearned charge. Section 8(c), entitled "Fees, salaries, compensation, or other payments," specifies that certain bona fide service fees and disclosed referral fees are not prohibited by

[7]As enacted by Congress, RESPA contained no subsection titles. See RESPA, Pub. L. No. 93-533, § 8(b), 88 Stat. 1724, 1727 (1974). Accordingly, we note titles only for ease of reference, without giving them interpretive weight. See United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 448 & n.3 (1993) (stating that Statutes At Large constitute "legal evidence of laws" unless Congress has expressly enacted U.S. Code title as positive law).

RESPA. Id. § 2607(c).

Chase argues that, together, these subsections support an interpretation of § 8(b) that protects consumers from unearned fees only when included in charges divided among two or more persons. Because the referral fees referenced in subsection (a) and the safe harbor created by subsection (c) appear to reference fees involving two or more parties, Chase urges us to conclude that Congress necessarily intended subsection (b) to prohibit unearned fees only when charges were divided among multiple persons. However plausible this reading of the statutory structure, it is no more compelling than Chase's similar reading of the text. It is equally plausible that Congress could have intended RESPA § 8(b) to prohibit behavior separate and distinct from subsection (a). Moreover, its decision not to provide a safe harbor for unearned fees in subsection (c) makes equal sense whether such fees are divided or not.

Because the structure of the statute does not speak unambiguously to Congress's intent with respect to undivided unearned fees, it cannot resolve textual ambiguity at Chevron step one. Cf. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. at 133-43 (rejecting agency interpretation at Chevron step one as "incompatible with" and "precluded" by "coherent regulatory scheme").

(2) Purpose

In RESPA, Congress identified two concerns requiring "significant reforms in the real estate settlement process": (1) providing consumers with "greater and more timely information on the nature and costs" of that process, and (2) providing consumers with "protect[ion] from unnecessarily high settlement charges caused by certain abusive

practices." 12 U.S.C. § 2601(a). To address these concerns, Congress identified RESPA's purpose as four-fold: (1) "more effective advance disclosure to home buyers and sellers of settlement costs," (2) "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services," (3) "a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance," and (4) "reform and modernization of local recordkeeping of land title information." Id. § 2601(b). Pointing to the absence of any reference to undivided unearned fees in this statement of purpose, the Fourth Circuit has concluded that RESPA § 8(b) is limited to divided fees. See Boulware v. Crossland Mortgage Corp., 291 F.3d at 268.

We are not convinced, however, that Congress's silence on the issue of undivided unearned fees demonstrates its direct consideration of the issue, much less its clear intent to exclude such charges from the protections § 8(b) affords consumers. First, as the Supreme Court has recognized, "statutory prohibitions often go beyond the principal evil [identified by Congress] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). Indeed, RESPA provisions, such as the prohibition on charges for the preparation of truth-in-lending statements, see 12 U.S.C. § 2610, go beyond the stated statutory goal to eliminate kickbacks and referral fees. Second, although RESPA's statement of purpose nowhere references undivided unearned fees, the prohibition of such fees is consistent with RESPA's overall goal to protect

consumers from "abusive practices" that result in "unnecessarily high settlement charges." 12 U.S.C. § 2601(a). In short, this is not a case where one reading of ambiguous text can be ruled out because it would harm the very class that Congress intended to protect. See General Dynamics Land Sys., Inc. v. Cline, 540 U.S. at 586 (reaching that conclusion with respect to agency's construction of Age Discrimination in Employment Act).

Because RESPA's stated purpose neither requires that § 8(b) be construed to prohibit undivided unearned fees nor precludes that interpretation, it does not render the statutory text unambiguous at Chevron step one.

(3) Legislative History

This court has generally been reluctant to employ legislative history at step one of Chevron analysis, see Coke v. Long Island Care at Home, Ltd., 376 F.3d at 127 & n.3, mindful that the "interpretive clues" to be found in such history will rarely speak with sufficient clarity to permit us to conclude "beyond reasonable doubt" that Congress has directly spoken to the precise question at issue, General Dynamics Land Sys., Inc. v. Cline, 540 U.S. at 590, 600. This case is no exception.

The legislative history of RESPA § 8(b) is set forth most authoritatively in Senate Report No. 93-866 (1974), as reprinted in 1974 U.S.C.C.A.N. 6546.[8] The Senate Report describes Section 8 (then numbered Section 7) as follows:

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[8]The Senate bill was passed in lieu of the House bill, and the House Conference Report makes no mention of the provision that became § 8(b). See S. Rep. No. 93-866 (1974), as reprinted in 1974 U.S.C.C.A.N. 6546; H.R. Rep. No. 93-1526 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 6569.

PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES

> Section 7 is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or "thing of value" furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed. Reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited.
>
> In a number of areas of the country, competitive forces in the conveyancing industry have led to the payment of referral fees, kickbacks, rebates, and unearned commissions as inducements to persons who are in a position to refer settlement business. Such payments take various forms. For example, a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application. A discount or allowance for the prompt payment of a title insurance premium or other charge for a settlement service may be given to realtors or lenders as a rebate for the placement of business with the individual or company giving the discount. An attorney may give a portion of his fee to another attorney, lender, or realtor who simply refers a prospective client to him. In some instances, a "commission" may be paid by a title insurance company to a corporation that is wholly-owned by one or more savings and loan associations, even though that corporation performs no substantial services on behalf of the title insurance company.
>
> In all of these instances, the payment or thing of value furnished by the person to whom the settlement business is referred tends to increase the cost of settlement services without providing any benefits to the home buyer. While the making of such payments may heretofore have been necessary from a competitive standpoint in order to obtain or retain business, and in some areas may even be permitted by state law, it is the intention of section 7 to prohibit such payments, kickbacks, rebates, or unearned commissions.

Id. at 6551.

The examples identified in the Senate Report all appear to reference charges divided among multiple persons. Such examples, however, cannot by themselves compel a

conclusion that Congress directly considered and clearly rejected a prohibition of undivided unearned fees. See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. at 649, rev'g 875 F.2d 1008 (2d Cir. 1989). When the Pension Benefit case was before this court, we noted passages in ERISA's legislative history indicating that Congress had considered a particular circumstance a valid basis for restoration of pension plans but had made no mention of another possible circumstance. We reasoned that, because the second circumstance was "not among the bases for restoration by Members of Congress, that body must have intended that the existence of [that second circumstance] not be a reason for restoring pension plans." Id. (emphasis in original) (summarizing analysis appearing at 875 F.2d at 1017). The Supreme Court reversed, ruling that the legislative history did not "compel" such a narrow interpretation of the statute. Id. The Court explained:

> [T]he language of a statute — particularly language expressly granting an agency broad authority — is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of the statute's operation in practice. It is not, as the Court of Appeals apparently thought, a definitive interpretation of a statute's scope. We see no suggestion in the legislative history that Congress intended its list of examples to be exhaustive. Under these circumstances, we conclude that ERISA's legislative history does not suggest "clear congressional intent" on the question of follow-on [pension] plans.

Id.

In this case Congress has similarly granted RESPA's administering agency, HUD, broad authority "to prescribe such rules and regulations" and "to make such interpretations . . . as may be necessary to achieve the purposes" of the statute. 12 U.S.C. § 2617. In these circumstances, Pension Benefit does not permit us to conclude, merely from the absence of

an example of undivided charges in RESPA's legislative history, that Congress thereby expressed its clear intent that § 8(b) not protect consumers from any unearned fees except those reflected in divided charges. The legislative history may demonstrate that Congress's primary concern was divided charges, but that does not convincingly establish that Congress "intended its list of examples to be exhaustive" or "suggest 'clear congressional intent'" not to protect consumers from undivided unearned fees. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. at 649.

Because neither the structure, purpose, nor legislative history of RESPA § 8(b) clearly resolves the identified textual ambiguity with respect to undivided unearned fees, we proceed to the second step of Chevron analysis.

d. HUD Reasonably Construes RESPA § 8(b) to Prohibit Undivided Unearned Fees

At Chevron step two, we will defer to a reasonable agency interpretation of ambiguous statutory language "when it appears that Congress has delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). As previously noted, 12 U.S.C. § 2617 confers such authority on HUD. Moreover, in Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 58-61, this court ruled that HUD acted pursuant to this authority in promulgating its Policy

Statement respecting § 8(b).[9] We now hold that HUD's Policy Statement reasonably interprets § 8(b) comprehensively to prohibit unearned fees, whether reflected in a charge divided among multiple parties or an undivided charge from a single lender, as in this case. In determining that the statutory reference to "any portion, split, or percentage of any charge" gives rise to an ambiguity as to Congress's intent, we have already observed that the phrase can plausibly be construed to sweep broadly, prohibiting unearned fees regardless of whether or not they are divided. The structure, purpose, and history of RESPA do not clearly demonstrate that Congress considered and rejected such a construction. Thus, even if Congress's focus in propounding § 8(b) was on unearned fees that the lending industry was routinely incorporating into divided charges, the statute can reasonably be construed also to reach undivided unearned fees. Such an outcome is hardly unusual. "[S]tatutory prohibitions often go behind the principal evil" prompting congressional action "to cover reasonably comparable evils." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. at 79. From the perspective of those consumers whom Congress sought to protect through § 8(b), HUD's interpretation has the virtue of making that protection depend solely on the fact that a fee is unearned, not on whether the lender keeps 99.9% of the charge rather than 100%.

In a footnote to its main brief, Chase argues that HUD's interpretation is unreasonable because it is an unexplained change from the agency's previous position. See Motor Vehicle

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[9]The Policy Statement was not promulgated by HUD pursuant to notice-and-comment rulemaking; nevertheless, Kruse concluded that it reflected sufficient agency consideration and application of expertise to merit Chevron deference. See Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d at 58-61.

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("An agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required . . . in the first instance."). We are not convinced. In the 1976 edition of its consumer information booklet, which HUD is required by law to distribute to borrowers and lenders, see 12 U.S.C. § 2604, the agency advised that it is "illegal to charge or accept a fee or part of a fee where no service has actually been performed," 41 Fed. Reg. 20,280, 20,289 (1976). The 1997 edition of the information booklet similarly states: "It is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 Fed. Reg. 31,982, 31,998 (1997). Thus, even before adopting the 2001 Policy Statement relied on by Cohen in this case, the agency had consistently taken the position that § 8(b) prohibits unearned fees, in whole or in part.

At oral argument, Chase further challenged the reasonableness of HUD's interpretation by pointing to a possible anomalous result in that a lender could be liable under RESPA § 8(b) for charging an unearned $225 post-closing fee but, under Kruse, could not be liable if it charged a borrower $225 more for a service that was actually provided. See Krzalic v. Republic Title Co., 314 F.3d at 880 (discussing similar hypothetical). We have no occasion to consider the legality of the latter action on this appeal. But, even assuming that Chase is correct, the fact that § 8(b) does not safeguard against all means by which unscrupulous lenders could impose "unnecessarily high settlement charges" on consumers, 12 U.S.C. § 2601(a), does not render unreasonable HUD's interpretation with respect to undivided unearned fees. "'The Supreme Court repeatedly has instructed that neither the fact

that a classification may be overinclusive or underinclusive nor the fact that a generalization underlying a classification is subject to exceptions renders the classification irrational.'" Chen v. Ashcroft, 381 F.3d 221, 227 (3d Cir. 2004) (Alito, J.) (quoting Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 822-23 (11th Cir. 2004)). So too, mere overinclusiveness or underinclusiveness is insufficient to render an agency interpretation unreasonable at Chevron step two. See id.

Because we determine that HUD reasonably construes RESPA § 8(b) to prohibit "one service provider" from charging the consumer a fee for which "no . . . work is done," Policy Statement, 66 Fed. Reg. at 53,057, we defer to that interpretation and conclude that Cohen adequately states a claim under RESPA § 8(b) by alleging that Chase collected an undivided unearned fee. Accordingly, we vacate the Rule 12(b)(6) dismissal of this part of her complaint.

B. Cohen's State Law Claim

Cohen further appeals the dismissal of her deceptive practices claim under New York General Business Law § 349. We review that dismissal de novo. See Broder v. Cablevision Sys. Corp., 418 F.3d 187, 193-94 (2d Cir. 2005).

Section 349 states: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." N.Y. Gen. Bus. Law § 349. A § 349 claim has three elements: (1) the defendant's challenged acts or practices must have been directed at consumers, (2) the acts or practices must have been misleading in a material way, and (3) the plaintiff must have sustained injury as a result.

See Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000) (citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 623 N.Y.S.2d 529 (1995)). A successful plaintiff can recover both treble damages and attorney's fees. See N.Y. Gen. Bus. Law § 349(h).

The element at issue on this appeal is the requisite misleading act. The New York Court of Appeals has adopted an objective definition of "misleading," under which the alleged act must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 26, 623 N.Y.S.2d at 532-33. The district court concluded that the $225 post-closing fee complained of in this case could not be objectively misleading because it had been disclosed prior to closing. New York law offers some support for this conclusion. See Zuckerman v. BMG Direct Mktg., Inc., 290 A.D.2d 330, 737 N.Y.S.2d 14 (1st Dep't 2002) (holding shipping and handling fees not deceptive where amounts disclosed); Sands v. Ticketmaster-New York, Inc., 207 A.D.2d 687, 616 N.Y.S.2d 362 (1st Dep't 1994) (same re: disclosed ticket service fees); Lewis v. Hertz Corp., 181 A.D.2d 493, 581 N.Y.S.2d 305 (1st Dep't 1992) (same re: disclosed rental car refueling fees).

In none of these cases, however, did the courts have occasion to consider fees prohibited by other substantive laws. As Chase concedes, New York courts have held that collecting fees in violation of other federal or state laws may satisfy the misleading element of § 349. See Negrin v. Norwest Mortgage, Inc., 263 A.D.2d 39, 50, 700 N.Y.S.2d 184, 193 (2d Dep't 1999) ("Allegations of a bank's unilateral imposition of illegal and/or unwarranted

fees upon its customers state a valid claim [under § 349]."); Bartolomeo v. Runco, 162 Misc. 2d 485, 490, 616 N.Y.S.2d 695, 699 (Yonkers City Ct. 1994) (holding representation that "cellar apartment was a legal apartment . . . was false, misleading and deceptive" under § 349); cf. Lum v. New Century Mortgage Corp., 19 A.D.3d 558, 559, 800 N.Y.S.2d 408, 410 (2d Dep't 2005) (holding "no materially misleading statement" under § 349 where yield spread premium disclosed to plaintiff was not "per se illegal"). Certainly, Chase does not suggest that, in the absence of indications to the contrary, a consumer might not reasonably assume that all fees charged by a respected financial institution such as Chase were legal. We express no opinion as to whether Cohen will, in fact, show that the challenged $225 post-closing fee violates RESPA § 8(b), but while she pursues that claim, we cannot conclude simply from the fact of disclosure that, as a matter of law, the charge cannot constitute a deceptive practice in violation of § 349.

Accordingly, we vacate the dismissal of Cohen's § 349 claim. We further note that, upon remand, the district court should allow Cohen to amend her state law claim to include her belated allegation that payment of the challenged post-closing fee was coerced by the threat of forfeiting a $425 non-refundable application and appraisal fee. Whatever the merits of this coercion claim, it cannot be rejected as a matter of law at this very early stage of the litigation.

III. Conclusion

To summarize:

1. We defer to HUD's interpretation of RESPA § 8(b) to prohibit unearned fees

whether reflected in divided or undivided charges.

2. Because the post-closing fee challenged in this case may violate RESPA, its disclosure to the plaintiff before payment does not preclude a claim for deceptive business practices under New York General Business Law § 349.

The judgments of the district court, entered on March 16, 2005, and January 4, 2006, are VACATED, and the case is hereby REMANDED for reinstatement of the complaint and further proceedings consistent with this opinion.

Young, Maureen A.

From: FDIC Subscriptions [subscriptions@fdic.gov]
Sent: Friday, June 22, 2007 8:07 AM
To: Young, Maureen A.
Subject: Statement by FDIC Chairman Sheila C. Bair on the Bank Secrecy Act's Effectiveness and Efficiency

Press Release

Statement by FDIC Chairman Sheila C. Bair on the Bank Secrecy Act's Effectiveness and Efficiency

FOR IMMEDIATE RELEASE
June 22, 2007

Media Contact:
David Barr (202) 898-6992
dbarr@fdic.gov

FDIC Chairman Sheila C. Bair today issued the following statement about Treasury Secretary Henry Paulson's Remarks on Protecting the Financial System and Effective Implementation of the Bank Secrecy Act at the offices of the Financial Crimes Enforcement Network (FinCEN):

"I applaud Treasury Secretary Paulson and FinCEN Director Freis for addressing the need to tailor administration of the Bank Secrecy Act (BSA) to the varying risk profiles of community banks. I've been a consistent advocate for a common sense approach to the obligations that BSA requirements impose on financial institutions. While the goal is to diminish the potential for money laundering and other illicit financial activity, the understanding that the vast majority of community banks may have less exposure should result in a more focused examination process. We welcome the opportunity to continue working with FinCEN and the other bank regulatory agencies to ensure that BSA guidance and procedures are effective and efficient for banks of all sizes.

"I commend FinCEN's continuing efforts to review money services businesses' (MSBs) compliance with the BSA. The FDIC has partnered with FinCEN, the Conference of State Bank Supervisors, and the Money Transmitter Regulators Association to ensure that issues surrounding the discontinuance of banking services for MSBs are being actively addressed. We are also looking forward to enhancing our knowledge of state agencies' MSB examination practices."

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Congress created the Federal Deposit Insurance Corporation in 1933 to restore public confidence in the nation's banking system. The FDIC insures deposits at the nation's 8,650 banks and savings associations and it promotes the safety and soundness of these institutions by identifying, monitoring and addressing risks to which they are exposed. The FDIC receives no federal tax dollars - insured financial institutions fund its operations.

FDIC press releases and other information are available on the Internet at www.fdic.gov, by subscription electronically (go to www.fdic.gov/about/subscriptions/index.html) and may also be obtained through the FDIC's Public Information Center (877-275-3342 or 703-562-2200). **PR-54-2007**

BNA'S
Banking Report

Volume 88 Number 25
Monday, June 25, 2007
ISSN 1522-5984

News

Money Laundering
Treasury Department Announces Plan To Streamline Anti-Money Laundering Effort

The Financial Crimes Enforcement Network June 22 unveiled a four-part plan to streamline anti-money laundering examinations and compliance, promising a more focused approach that authorities said will encourage improved cooperation from the financial services industry.

"We can come up with something clear and less confusing," Treasury Secretary Henry Paulson said as he announced the plan during a speech at the Vienna, Va., headquarters of FinCEN, the Treasury Department's anti-money laundering unit.

The plan garnered immediate praise from trade associations, many of whom call anti-money laundering compliance the biggest and most worrisome concern for their member institutions.

"The Secretary's plan rightfully places the focus on results in combating criminals and thwarting terrorists. The message cannot be missed that Treasury at the highest levels is working to strengthen the connection between resources used and the results produced," said Wayne Abernathy, the American Bankers Association's executive director for financial institutions policy and regulatory affairs.

However, the plan offers no relief for bankers looking for scaled-back filing requirements for Suspicious Activity Reports and Currency Transaction Reports, which financial institutions submit to the government for reporting and analysis of possible money laundering and terrorist-related financing.

FinCEN Director James H. Freis Jr., who kicked off a broad review of anti-money laundering compliance shortly after taking the FinCEN post in April, said the Government Accountability Office is still working on a congressionally mandated study of SAR and CTR burdens.

But in response to questions, Paulson suggested that SARs and CTRs also might receive consideration under a risk-based approach.

Four-Part Plan Announced

The proposal, initially reported by some outlets as a plan to ease burdens on small banks, applies to all classes of financial institutions covered by the Bank Secrecy Act (BSA) and other federal anti-money laundering prohibitions, including money service businesses--smaller non-bank enterprises such as currency dealers, check-cashing firms, and other such enterprises that find it hard to obtain bank accounts because of worries that MSBs are more vulnerable to money laundering risks.

The plan, which officials hope to build into examination guidelines by the summer of 2008, has four key components. It aims to:

- Make the BSA exam process more risk-based by matching compliance obligations to the actual risk that institutions take on. For example, a bank that does little or no business with international clients or accounts will have a different risk profile from an institution whose business is dominated by global account relationships.

- Revamp oversight of MSBs and define them more narrowly, so as to focus only on those engaged in risky activities.

- Consolidate federal regulations to make it easier for institutions to understand their obligations. At present, for example, compliance officers trying to understand their obligations must search through several different sections of the Code of Federal Regulations. The new plan will give FinCEN its own two-part chapter of the CFR, making reference far easier. "With this change," FinCEN said, "an institution will only need to look in two places to identify its responsibilities."

Improve feedback to financial services providers. Officials said they want to periodically give the financial services industry more information on how BSA data is being used, as long as the government can do so without betraying operational secrets.

Community Bankers Cheer Plan

Although anti-money laundering compliance is a major concern across the financial services sector, community bankers say they are especially hard-hit.

That concern has been a top agenda item for the Independent Community Bankers of America, which called the Treasury plan a step forward.

"Today's announcement is a welcome initiative in reducing the disproportional regulatory burden facing community banks while still safeguarding our nation's security. The four steps proposed today will help streamline compliance," said Karen Thomas, the ICBA's executive vice president and director of government relations.

Federal bank regulators also cheered the move. Federal Deposit Insurance Corporation Chairman Sheila Bair described the plan as "a common sense approach" to BSA obligations, while Federal Reserve Governor Randall S. Kroszner said the Fed will continue to work with the Treasury "to develop and implement risk-based practices that achieve government policy objectives without imposing undue burden."

A link to a FinCEN fact sheet on the plan may be found on FinCEN's Web site at: http://www.fincen.gov/bsa_fact_sheet.html.

By R. Christian Bruce

Bank Secrecy Act Effectiveness and Efficiency Fact Sheet

- **Matching Risk-Based Examination to Risk-Based Obligations.** FinCEN and the regulatory community recognize that not all financial institutions are subject to the same risk. An institution with minimal to no international business that serves only a handful of communities does not share the same risk profile as a bank that does business around the world in many currencies. FinCEN will initiate a joint effort with the federal banking regulators to ensure that financial institutions and regulators treat compliance obligations in a manner that helps to avoid expenditures that are not commensurate with actual risk. Over the coming months, in keeping with the evolution of our risk-based system, FinCEN and the regulators will work to translate this concept into more concrete practice, with a view to providing more direction in guidance and future revisions to the FFIEC Examination Manual.

- **Money Services Businesses (MSBs).** FinCEN has been working with the IRS, state regulators and federal functional regulators to address many issues dealing with MSB oversight and MSB access to banking services. These efforts will result in the production of MSB examination materials using the success of the FFIEC Examination Manual as a model.

  FinCEN also has committed to crafting a more narrow definition of MSBs. Many of the estimated 150,000 to 200,000+ entities that are presently covered may only engage in financial services that pose little to no opportunity for money laundering. A risk-based reduction in covered entities would result in a better concentration of examination resources.

- **Making Regulations More Intuitive.** FinCEN has issued AML/CFT regulations for many industries including banking, MSBs, insurance companies, brokerages, casinos, jewelers and others. Presently, a compliance official seeking to learn all the regulatory obligations for a particular industry would need to sift through many citations and cross-references located in many different areas. FinCEN will begin work on its own new chapter of the Code of Federal Regulations that will include one general part and *separate and specific parts* for each covered industry. With this change, an institution will only need to look in two places to identify its regulatory responsibilities.

- **Feedback.** FinCEN depends on its industry partners to provide quality and timely information for its own expert analysis and law enforcement's use. FinCEN is committed to working with its law enforcement partners to let industry know as much as operational sensitivities allow about how its valuable information is being used. FinCEN issues many reports and studies, but seeks to provide additional quality information to industry and law enforcement. FinCEN will provide written feedback to the affected industry within 18 months of the effective date of a new regulation or change to an existing regulation and will focus on providing additional trend analyses, like its Mortgage Fraud and Shell Company studies, as well as additional illuminating law enforcement case examples. When issues of non-compliance do arise, FinCEN will strive to better communicate how any penalties are correlated to the underlying violations, so as to avoid misimpressions about the nature of such conduct and provide a clear message to the industry about these actions.

Department of the Treasury
Financial Crimes Enforcement Network

Guidance

FIN-2007-G002
Issued: June 13, 2007
Subject: Requests by Law Enforcement for Financial Institutions to Maintain Accounts

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The Financial Crimes Enforcement Network (FinCEN) is issuing the following guidance for financial institutions with account relationships that law enforcement may have an interest in ensuring remain open notwithstanding suspicious or potential criminal activity in connection with the account.[1] Ultimately, the decision to maintain or close an account should be made by a financial institution in accordance with its own standards and guidelines. Although there is no requirement that a financial institution maintain a particular account relationship, financial institutions should be mindful that complying with such a request may further law enforcement efforts to combat money laundering, terrorist financing, and other crimes.

If a law enforcement agency requests that a financial institution maintain a particular account, the financial institution should ask for a written request. A written request from a federal law enforcement agency should be issued by a supervisory agent or by an attorney within a United States Attorney's Office or another office of the Department of Justice. If a state or local law enforcement agency requests that an account be maintained, then the financial institution should obtain a written request from a supervisor of the state or local law enforcement agency or from an attorney within a state or local prosecutor's office. The written request should indicate that the agency has requested that the financial institution maintain the account and the purpose of the request. For example, if a state or local law enforcement agency is requesting that the financial institution maintain the account for purposes of monitoring, the written request should include a statement to that effect.[2] The request should also indicate the duration for the request, not to exceed six months. Law enforcement may issue subsequent

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[1] FinCEN consulted with the staffs of the Department of Justice, the Federal Bureau of Investigation, the Internal Revenue Service's Criminal Investigation Division, the United States Secret Service, the Bureau of Immigration and Customs Enforcement, the Drug Enforcement Administration, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Commodity Futures Trading Commission, and the Securities and Exchange Commission prior to issuing this guidance.
[2] Nothing in this guidance is intended to alter or modify the duties or obligations of financial institutions under the Right to Financial Privacy Act (12 U.S.C. § 3401, et seq.), 18 U.S.C. § 1510, or similar provisions of law.

requests for account maintenance after the expiration of the initial request. Although there is no recordkeeping requirement under the Bank Secrecy Act for this type of correspondence, FinCEN recommends that financial institutions maintain documentation of such requests for at least five years after the request has expired. If a financial institution is aware – through a subpoena, 314(a) request, National Security Letter, or similar communication – that an account is under investigation, FinCEN recommends that the financial institution notify law enforcement before making any decision regarding the status of the account.

Financial institutions are reminded that, as part of their Bank Secrecy Act/Anti-Money Laundering compliance program requirement, they are required to have written policies, procedures, and processes that, among other things, address the identification and reporting of suspicious activity.[3] If the financial institution chooses to maintain the account, it is required to comply with all applicable Bank Secrecy Act recordkeeping and reporting requirements, including the requirement to file Suspicious Activity Reports, even if the bank is keeping an account open or maintaining a customer relationship at the request of law enforcement.

[3] *See* 31 C.F.R. Part 103, Subpart I.

Financial Crimes Enforcement Network

Guidance

FIN-2007-G003
Issued: June 13, 2007
Subject: Suspicious Activity Report Supporting Documentation

The Financial Crimes Enforcement Network (FinCEN)[1] is issuing this guic clarify:

(1) The Bank Secrecy Act (BSA) requirement that financial institut provide Suspicious Activity Report (SAR) supporting documentatio response to requests by FinCEN and appropriate law enforcement supervisory agencies;[2]

(2) What constitutes "supporting documentation" under SAR regul and

(3) When legal process is required for disclosure of supporting documentation.

(1) Disclosure of Supporting Documentation to FinCEN and Appr Law Enforcement or Supervisory Agencies

When a financial institution files a SAR, it is required to maintain a copy SAR and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR.' institutions must provide all documentation supporting the filing of a SA request by FinCEN or an appropriate law enforcement[5] or supervisory a

When requested to provide supporting documentation, financial institutic should take special care to verify that a requestor of information is, in fa representative of FinCEN or an appropriate law enforcement or supervis agency. A financial institution should incorporate procedures for such ve into its BSA compliance or anti-money laundering program. These proce may include, for example, independent employment verification with the requestor's field office or face-to-face review of the requestor's credenti

Disclosure of SARs to appropriate law enforcement and supervisory ager protected by the safe harbor provisions applicable to both voluntary and mandatory suspicious activity reporting by financial institutions.[7]

(2) What Constitutes Supporting Documentation

"Supporting documentation" refers to all documents or records that assi financial institution in making the determination that certain activity req SAR filing. A financial institution must identify supporting documentatior time the SAR is filed,[8] and this documentation must be maintained by th institution as such. The manner in which a financial institution maintains supporting documentation may vary from institution to institution, but e institution should prescribe its own method in its anti-money laundering written procedures. For instance, a financial institution's procedures may that all supporting documentation for a particular SAR be segregated in file folder or scanned and maintained in a data file.

What qualifies as supporting documentation depends on the facts and circumstances of each filing. As indicated in each of the SAR forms, finar institutions should identify in the SAR narrative the supporting documen which may include, for example, transaction records, new account inforr tape recordings, e-mail messages, and correspondence. While items ider the narrative of the SAR generally constitute supporting documentation, document or record may qualify as supporting documentation even if no identified in the narrative.

(3) No Legal Process is Required for Disclosure of Supporting Documentation

The Right to Financial Privacy Act (RFPA) generally prohibits financial ins from disclosing a customer's financial records to a Government agency v service of legal process, notice to the customer and an opportunity to ch the disclosure.[9] However, no such requirement applies when the financi institution provides the financial records or information to FinCEN or a st agency in the exercise of its "supervisory, regulatory or monetary functi addition, no such requirement applies when FinCEN or an appropriate la enforcement or supervisory agency requests either a copy of a SAR or st documentation underlying the SAR.

With respect to supporting documentation, rules under the BSA state ex that financial institutions must retain copies of supporting documentatio supporting documentation is "deemed to have been filed with" the SAR, financial institutions must provide supporting documentation upon reque FinCEN has interpreted these regulations under the BSA as requiring a fi institution to provide supporting documentation even in the absence of l process. FinCEN understands that this is in accord with the RFPA, which that nothing in the act "authorize(s) the withholding of financial records information required to be reported in accordance with any Federal statu promulgated thereunder."[12]

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[1]FinCEN consulted with staffs of the Department of Justice, the Federal Bureau of Investigati Internal Revenue Service's Criminal Investigation Division, the United States Secret Service, Department of Homeland Security's Immigration and Customs Enforcement, the Drug Enforc

Administration, the Board of Governors of the Federal Reserve System, the Office of the Com the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Credit Union Administration, the Commodity Futures Trading Commission, and the Securities Exchange Commission prior to issuing this guidance.

[2] *See* 31 C.F.R. § 103.15(c); 31 C.F.R. § 103.16(e); 31 C.F.R. § 103.17(d); 31 C.F.R. § 103. C.F.R. § 103.19(d); 31 C.F.R. § 103.20(c); and 31 C.F.R. § 103.21(d).

[3] *Id.*

[4] *Id.*

[5] *See "Providing Suspicious Activity Reports to Appropriate Law Enforcement,"* SAR Activity R Trends, Tips & Issues, Issue 9 (Oct. 2005), p.43, http://www.fincen.gov/sarreviewissue9.pdf

[6] Supervisory agencies have independent statutory authority to examine all books and recor financial institutions for which they are the appropriate regulator.

[7] The BSA provides protection from civil liability for all reports of suspicious transactions mac appropriate authorities, including supporting documentation, regardless of whether such repo mandatory. Specifically, the BSA provides that a financial institution, or a director, officer, er agent of a financial institution, that makes a "voluntary disclosure of any possible violation o regulation to a government agency" shall not be liable to any person under "any law or regul United States, any constitution, law, or regulation of any State or political subdivision of any under any contract or other legally enforceable agreement (including any arbitration agreem such disclosure or for any failure to provide notice of such disclosure to the person who is th such disclosure or any other person identified in the disclosure." 31 U.S.C. § 5318(g)(3).

[8] Suspicious Transactions Reporting Requirements, 61 Fed. Reg. 4326, 4330 (February 5, 19 Supporting documentation should **not** be attached to the SAR filing.

[9] This guidance is only applicable to financial records or information that constitute supportir documentation pursuant to provisions in the Bank Secrecy Act that govern the reporting of s transactions. Consequently, nothing in this guidance is intended to alter or modify the duties obligations of financial institutions subject to the Right to Financial Privacy Act (12 U.S.C. § 3 seq.), 18 U.S.C. § 1510, or similar provisions of law. When responding to law enforcement re customer financial records or information other than SAR supporting documentation, financia subject to the RFPA must still comply with that statute's notice and challenge provisions in th an applicable exception, e.g. service of a grand jury subpoena or a national security letter.

[10] *See* 12 U.S.C. § 3413(b).

[11] *See* 31 C.F.R. § 103.15(c); 31 C.F.R. § 103.16(e); 31 C.F.R. § 103.17(d); 31 C.F.R. § 103 C.F.R. § 103.19(d); 31 C.F.R. § 103.20(c); and 31 C.F.R. § 103.21(d).

[12] *See* 12 U.S.C. 3413(d).

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BNA, Inc.

Privacy & Security Law

REPORT

Volume 6 Number 27
July 2, 2007
ISSN 1538-3431

Lead Report

Homeland Security

U.S., EU Reach Accord on Obligations Of Treasury in Drawing on SWIFT Data

BRUSSELS--The European Union approved a deal with the United States June 28 that allows U.S. anti-terror authorities to use data from SWIFT--the Brussels-based international banking network--for their investigations, while protecting the data privacy of EU citizens, according to a European Commission statement.

The deal comes after months of negotiations over how the U.S. government can obtain financial records from SWIFT (the Society for Worldwide Interbank Financial Telecommunication) for anti-terrorism purposes without violating EU privacy regulations. The EU data protection directive (95/46/EC) restricts the transfer of data to countries that do not have privacy standards deemed adequate by the EU.

Under the new arrangement, the U.S. Treasury Department agreed to new restrictions on the way it uses EU personal banking data obtained by subpoena from SWIFT, and to limit its retention to five years, the statement said.

"The EU will now have the necessary guarantees that U.S. Treasury processes data it receives from SWIFT's mirror server in the United States in a way which takes account of EU data protection principles," said Franco Frattini, EU Commissioner for Justice and Security.

A spokesman for Frattini, Friso Roscam-Abbing, emphasized to BNA June 28 that "There is no legal agreement between the two sides." Rather, "the European Commission and the Council of the European Union have decided to accept unilateral commitments, called representations, by the U.S. Treasury Department regarding the way they handle EU personal data subpoenaed from SWIFT. The Commission and the Council decided that these representations address EU concerns about data protection," he said.

SWIFT, a cooperative owned by some 8,100 financial institutions in 207 countries and territories, is a financial-transfer company with operations worldwide. EU and Belgian authorities last year alleged that the Brussels-based company broke privacy laws by allowing investigators from the Treasury Department to access its records in international investigations following the Sept. 11, 2001, terrorist attacks. The company argued that as a data processor it was obliged to comply with U.S. demands for data.

The EU and United States have been negotiating terms of an agreement since last year.

Safe Harbor

The Commission said Treasury commitments are one part of three required components to settle the international problem of SWIFT. The second component involves the EU-U.S. Safe Harbor accord, which would allow the legal transfer of commercial data to its U.S.-based server. SWIFT is in the final stages of discussions with U.S. authorities on that safe harbor status.

Third, SWIFT and its financial-institution customers also committed in the agreement to disclose to bank customers that their personal data will be transferred to the United States and could be accessed by Treasury under the Terrorist Finance Tracking Program.

Under the new deal, "To ensure transparency and legal certainty," the U.S. commitments, along with U.S. and EU letters of transmission and receipt, will be published in the Official Journal of the European Union in all official languages, and [the] U.S. Treasury Department will ensure publication" in the U.S. *Federal Register*, the Commission said.

According to the Commission, "The EU reply to Treasury notes that if SWIFT and the financial institutions that use its services satisfy the information obligations and if SWIFT respects Safe Harbor principles, SWIFT and the financial institutions will be in compliance with their respective obligations under European data protection law."

The Safe Harbor allows the transfer of personal data from an EU member state to the United States. Organizations on the U.S. Department of Commerce's Safe Harbor list have self-certified that they will adhere to a set of Safe Harbor data protection principles. The names of such organizations are on Safe Harbor list, which is published on the Commerce Department Web site and now includes over 1,000 entities.

The Commission statement said Treasury hammered out the text of its representations in negotiations with the European Council president and the Commission. It said the statements "take account of EU concerns about protection of EU originating personal data which may be subpoenaed in the United States by the U.S. Treasury under the U.S. Treasury Terrorist Finance Tracking Program."

According to the Commission, Treasury has unilaterally committed to using any data received from SWIFT only for counterterrorism, including when data are shared with other U.S. agencies and other countries. For example, the data could not be used for commercial or other purposes.

Treasury committed to regularly check data subpoenaed from SWIFT to identify and delete data not necessary for a terrorism investigation. It also committed to retaining dormant data (i.e., subpoenaed data not identified as necessary for counterterrorism) for no more than five years from date of receipt, or for data received before publication of the representations, no more than five years from the date of publication.

EU Oversight

The commitments provide for an "eminent European" to be appointed by the Commission--in consultation with the president of the Committee of Permanent Representatives and of the European Parliament's Civil Liberties Committee--to oversee Treasury's compliance.

That person will report to the Commission, which will report to the Parliament and Council, it said, and Treasury's unilateral representations will be transmitted by the Undersecretary of the Treasury to the Council Presidency and to the European Commission, who will jointly acknowledge receipt.

"The European Commission considers that the legal framework resulting from the above mentioned elements is sufficient to guarantee respect for and the enforcement of European data protection rights," it said.

Information on the Commerce Department's safe harbor program is available at http://www.export.gov/safeharbor/

By Rick Mitchell